5658

1603 No. ~~5644~~.

IN THE

1597

United States

Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

Pacific Coin Lock Company, a corporation of California,
Appellant,

vs.

Coin Controlling Lock Company, a corporation of Arizona,
Appellee.

APPELLANT'S BRIEF.

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APPELLANT'S BRIEF.

I.

STATEMENT OF THE CASE.

The Coin Controlling Lock Company, an Arizona corporation, appellee, was engaged in the business of manufacturing coin controlled locks for use in comfort stations, rest rooms and toilets, the coin controlled lock being affixed to the door of the toilet and opened by depositing a coin in the lock.

The appellee rented its locks to independent parties to use in certain territories, retaining title to the locks, but permitting their use by others upon payment of a fixed yearly rental.

The appellant, Pacific Coin Lock Company, a California corporation, entered into an agreement with the appellee, under the terms of which it rented from the latter a quantity of locks to be used in toilet locations secured by the appellant within the district in which it had been granted the exclusive right to use appellee's locks. This territory embraced Texas, California, Washington and Oregon.

The appellant secured locations in its territory and entered into numerous contracts between itself and the owners of the toilets, whereby the owners obligated themselves to permit the appellant to install locks on the toilet doors in return for a certain percentage of the receipts from the locks. The contracts did not stipulate what locks were to be used. There was no privity of contract between the toilet owners and the appellee.

Relying upon the clauses in its contract with the Coin Controlling Lock Company which provided that the appellee would furnish all the locks needed by the appellant, said locks to be of good workmanship and material, the appellant entered into a great many contracts with toilet owners for the placing of locks in their establishments.

The appellee, however, failed and neglected to furnish the appellant locks as needed or locks of good workmanship and material, thereby seriously hampering appellant in the conduct of its business and causing it the loss of some very valuable and choice locations.

With this state of affairs exisiting the appellant, on April 23, 1923, gave appellant notice of termination of the contract because of the failure of the appellee to

perform its covenants and refused to accept more of the appellee's locks. The appellant also returned all of the locks in its possession and paid the rentals due on said locks up to and including the 1st day of July, 1923.

The appellee then filed an action against the appellant commencing its suit by a bill in equity, No. G-101, wherein it sought to do three things:

First: To enjoin the appellant from detaching any locks from any location upon which they had been installed.

Second: To require the appellant to account to the plaintiff for all of the rentals due and all of the sums due the defendant under lease contracts then in existence.

Third: To have an interlocutory receiver appointed to take over the business of the appellant until the matters in dispute should have been adjudicated.

The appellant filed a motion to dismiss this bill No. G-101, which was granted and the case was then transferred on stipulation of the parties to the law side of the court.

On the hearing of the motion counsel for the appellant argued that the appellee was seeking to construe the contract in such a manner as to give it an interest in the business. Judge Benjamin F. Bledsoe heard the motion and granted the motion of appellant to dismiss on the theory that the appellee did not have an interest in the business and that it was not entitled to an accounting and receivership, or the locations, or injunctive relief, but that its only remedy, if any, was damages for breach of the contract, which under his ruling would be the rental

value of the locks, and the value of any locks not returned.

The only questions properly before the District Court were whether or not the Pacific Coin Lock Company breached its contract with the Coin Controlling Lock Company. The amount of damages due the Coin Lock Company, if any; and whether or not the Pacific Coin Lock Company was entitled to recover on its counterclaim for the breaches of the Coin Lock Company alleged therein.

The cause was tried on the law side of the court before the Honorable Edward J. Henning, who rendered judgment for the plaintiff and made the following findings of fact and conclusions of law:

(Title of Court and Cause.)

"Findings of Fact and Conclusions of Law.

"The above entitled matter came on regularly to be heard in the United States District Court for the Southern District of California, Southern Division, before the Honorable Edward J. Henning on October 19th, 1927; Clyde H. Jones, Albert Schoonover, J. Robert O'Connor and E. D. Martindale appeared as counsel for the plaintiff, and Mr. Nathan Newby of the firm of Newby & Newby appeared as counsel for the defendant. A jury was waived by written stipulation, and evidence both oral and documentary was received by the court, and the evidence having been closed and the case argued by counsel the court thereupon ordered the case submitted and thereafter, upon the 3rd day of March, 1928, rendered a written memorandum decision and now makes the following findings of fact and conclusions of law.

"The court finds:

I.

"That plaintiff, Coin Controlling Lock Company, is a corporation duly organized and existing under the laws of the state of Arizona and a citizen and resident of said state, and the defendant, Pacific Coin Lock Company, is a corporation duly organized and existing under the laws of the state of California, and a citizen of and resident of said state.

II.

"That on February 23, 1915, and long prior thereto plaintiff was the owner of sundry United tSates and foreign letters patent on coin controlled locks, which said coin controlled locks are a mechanism to be placed on doors so that said doors cannot be opened without dropping a coin in said coin controlled lock.

III.

"That on February 23, 1915, plaintiff entered into a certain contract at Indianapolis, Indiana, whereby plaintiff leased to one Charles C. Garrison of Los Angeles, California, for a period as long as rentals were paid as in said contract specified. One hundred (100) coin controlled locks for the exclusive use of the said Charles C. Garrison in the state of California, which said coin controlled locks were owned by plaintiff and covered by sundry United States and foreign patents belonging to plaintiffs, as aforesaid, and the said contract further provided that plaintiff would lease additional locks belonging to plaintiff for the exclusive use of said Charles C. Garrison in the state of California.

IV.

"That thereafter and on February 23rd, 1915, the said Charles C. Garrison for a valuable consid-

eration, assigned, sold and transferred all of his right, title and interest in the said contract to the defendant, Pacific Coin Lock Company, a corporation of California, and plaintiff for a valuable consideration gave its consent to the assignment from the said Charles C. Garrison to the defendant, Pacific Coin Lock Company. That thereafter said contract was extended to include the states of Washington, Oregon and Texas.

V.

"That at various and sundry times from and after the said February 23rd, 1915, plaintiff delivered to the defendant, Pacific Coin Lock Company, large numbers of coin controlled locks covered by the said letters patent belonging to plaintiff, to be used by the said defendant, Pacific Coin Lock Company, in accordance with the terms and conditions of the aforesaid contract.

VI.

"That under the terms and conditions of said contract, the plaintiff guaranteed its lock as to material, workmanship and repair and agreed specifically to lease defendant additional locks as needed. Plaintiff failed from time to time in living up to its agreement. The defendant, however, did not take advantage of these situations as they arose from time to time.

VII.

"That under the terms and conditions of said contract the defendant had the right to terminate said contract on December 31st of any given year.

VIII.

"That on January 1st, 1923, defendant paid to the plaintiff lock rental for the next six months.

IX.

"That on April 23rd, 1923, defendant notified the plaintiff that it had terminated the contract and returned the plaintiff all of plaintiff's locks.

X.

"That plaintiff acted promptly and immediately brought suit against the plaintiff for damages for breach of contract.

"As Conclusions of Law From the Foregoing Findings of Fact, the Court Finds:

I.

"That as the defendant did not take advantage of the favor of the plaintiff to furnish to it locks as needed as the situations arose, defendant by its conduct condoned them and the plaintiff acted promptly when the defendant terminated the contract which in its judgment gave it cause for complaint, while on the other hand the defendant by its course of conduct in the face of complaints, substantially condoned the faults of plaintiff.

II.

"That the payment of the lock rental on January 1st, 1923, worked an automatic renewal of the contract for one year and while the defendant could terminate the contract as of December 31st of any year without a violation by it of the contract, defendant did, when it gave notice of termination on April 23rd, 1923, terminate the contract as of December 31st, 1923, instead of June 30th, 1923, as it sought to do.

III.

"Having given notice of termination the defendant should have paid the plaintiff on July 1st, 1923, rent-

als for the second half of the year on the basis of the locks chargeable to it on April 23, 1923.

IV.

"That plaintiff was entitled to recover rental on the locks for the second half of the year, 1923, for the number of locks chargeable to the defendant on April 23rd, 1923, but without costs.

V.

"That the defendant may not recover on its counterclaim.

"Let judgment be entered accordingly.

EDWARD J. HENNING,
Judge.

"Dated April 6th, 1928.

(Endorsed): "Received copy of the within findings this 5th day of April, 1928. Newby & Newby, by Nathan Newby, attorneys for the plaintiff. Filed April 6th, 1928. R. S. Zimmerman, clerk, by Francis E. Cross, deputy."

After these findings of fact and conclusions of law had been served on the defendant and appellant and had been signed and duly filed on April 6th, 1928, the court made amended findings of fact and conclusions of law as follows:

(Title of Court and Cause.)

"AMENDED FINDINGS OF FACT AND CONCLUSIONS OF LAW.

"The above entitled matter came on regularly to be heard in the United States District Court for the Southern District of California, Southern Division, before the Honorable Edward J. Henning on October 19th, 1927; Clyde H. Jones, Albert Schoonover, J. Robert O'Connor and E. D. Martindale

appeared as counsel for the plaintiff, and Mr. Nathan Newby of the firm of Newby & Newby appeared as counsel for the defendant. A jury was waived by written stipulation, and evidence both oral and documentary was received by the court, and the evidence having been closed and the case argued by counsel the court thereupon ordered the case submitted and thereafter, upon the 3rd day of March, 1928, rendered a written memorandum decision and now makes the following findings of fact and conclusions of law.

"The court finds:

I.

"That plaintiff, Coin Controlling Lock Company, is a corporation duly organized and existing under the laws of the state of Arizona and a citizen and resident of said state, and the defendant, Pacific Coin Lock Company, is a corporation duly organized and exisiting under the laws of the state of California, and a citizen of and resident of said state.

II.

"That on February 23, 1915, and long prior thereto plaintiff was the owner of sundry United States and foreign letters patent on coin controlled locks, which said coin controlled locks are a mechanism to be placed on doors so that said doors cannot be opened without dropping a coin in said coin controlled lock.

III.

"That on February 23, 1915, plaintiff entered into a certain contract at Indianapolis, Indiana, whereby plaintiff leased to one Charles C. Garrison of Los Angeles, California, for a period as long as rentals were paid as in said contract specified, one hundred (100) coin controlled locks for the exclusive

use of the said Charles C. Garrison in the state of California, which said coin controlled locks were owned by plaintiff and covered by sundry United States and foreign patents belonging to plaintiff, as aforesaid, and the said contract further provided that plaintiff would lease additional locks belonging to plaintiff for the exclusive use of said Charles C. Garrison in the state of California.

IV.

"That thereafter and on February 23, 1915, the said Charles C. Garrison for a valuable consideration, assigned, sold and transferred all of his right, title and interest in the said contract to the defendant, Pacific Coin Lock Company, a corporation of California, and plaintiff for a valuable consideration, gave its consent to the assignment from the said Charles C. Garrison to the defendant, Pacific Coin Lock Company. That thereafter said contract was extended to include the states of Washington, Oregon and Texas.

V.

"That at various and sundry times from and after the said February 23, 1915, plaintiff delivered to the defendant, Pacific Coin Lock Company, large numbers of coin controlled locks covered by the said letters patent belonging to plaintiff, to be used by the said defendant, Pacific Coin Lock Company, in accordance with the terms and conditions of the aforesaid contract.

VI.

"That under the terms and conditions of said contract the plaintiff guaranteed its lock as to material, workmanship and repair and agreed specifically to lease defendant additional locks as needed. Plaintiff failed from time to time in living up to its agree-

ment. The defendant, however, did not take advantage of these situations as they arise from time to time.

VII.

"That under the terms and conditions of said contract the defendant had the right to terminate said contract on December 31st of any given year.

VIII.

"That on January 1st, 1923. defendant paid to the plaintiff lock rental for the next six months.

IX.

"That on April 23rd, 1923, defendant notified the plaintiff that it had terminated the contract and returned to the plaintiff all of plaintiff's locks; that on said April 23rd, 1923, the defendant had in its possession six hundred and four (604) locks chargeable to it at five ($5.00) dollars each for the last six (6) months of 1923.

X.

"That plaintiff acted promptly and immediately brought suit against defendant for damages for breach of contract.

"As conclusions of law from the foregoing findings of fact the court finds:

I.

"That as the defendant did not take advantage of the failure of the plaintiff to furnish to it locks as needed as these situations arose, defendant by its conduct condoned them and the plaintiff acted promptly when the defendant terminated the contract which in its judgment gave it cause to complain, while on the other hand the defendant by its course of conduct in the face of complaints substantially condoned the faults of plaintiff.

II.

"That the payment of the lock rental on January 1st, 1923, worked an automatic renewal of the contract for one year and while the defendant could terminate the contract as of December 31st of any year without a violation by it of the contract, defendant did, when it gave notice of termination on April 23rd, 1923, terminate the contract as of December 31st, 1923, instead of June 30th, 1923, as it sought to do.

III.

"Having given notice of termination the defendant should have paid the plaintiff on July 1st, 1923, rentals for the second half of the year on the basis of the locks chargeable to it on April 23rd, 1923.

IV.

"That plaintiff is entitled to recover damages on the basis of rentals on the locks for the second half of the year 1923 for six hundred and four (604) locks chargeable to the defendant on April 23rd, 1923, at five ($5.00) dollars each, amounting to three thousand and twenty ($3020.00) dollars, but without costs.

V.

"That the defendant may not recover on its counterclaim.

"Let judgment be entered accordingly.

"Dated May 10th, 1928.

EDWARD J. HENNING,
Judge."

(Endorsed): "Filed Jun. 20, 1928. R. S. Zimmerman, clerk; by Francis E. Cross, deputy clerk."

The amended findings of fact and conclusions of law were not signed by the judge until May 10th, 1928, about a month late, and the judgment was filed June 20th, 1928.

The differences between the original findings and conclusions of law and amended findings and conclusions of laws are as follows:

1. Finding No. IX of the original findings of fact and conclusions of law is as follows:

> "That on April 23rd, 1923, defendant notified the plaintiff that it had terminated the contract and returned to the plaintiff all of plaintiff's locks."

2. Finding No. IX of the amended findings of fact and conclusions of law is as follows:

> "That on April 23rd, 1923, defendant notified the plaintiff that it had terminated the contract and returned to the plaintiff all of plaintiff's locks; that on said April 23rd, 1923, the defendant had in its possession six hundred and four (604) locks chargeable to it at five ($5.00) dollars each for the last six (6) months of 1923."

The differences between the conclusions of law are as follows:

1. Conclusion of Law No. IV of the original conclusions of law is as follows:

> "That plaintiff is entitled to recover rentals on the locks for the second half of the year 1923 for the number of locks chargeable to the defendant on April 23rd, 1923, but without costs."

2. Conclusion of Law No. IV of the amended conclusions of law is as follows:

> "That plaintiff is entitled to recover damages on the basis of rentals on the locks for the second half of the year 1923 for six hundred and four (604) locks chargeable to the defendant on April 23rd, 1923, at five ($5.00) dollars each, amounting to three thousand and twenty ($3020.00) dollars, but without costs."

Judgment was entered on the amended findings and conclusions of law on the 20th day of June, 1928, said judgment being as follows:

(Title of Court and Cause.)

"JUDGMENT.

"By reason of the law and findings on file herein.

"It is ordered, adjudged and decree:

"That plaintiff have judgment against the defendant Pacific Coin Lock Company, a corporation, for the sum of $3020.00; and

"It is further ordered, adjudged and decree:

"That the defendant, Pacific Coin Lock Company, a corporation, take nothing by reason of its cross-complaint on file herein.

"Let execution issue accordingly.

"Dated: June 20th, 1928.

EDWARD J. HENNING.

"Judgment entered June 20th, 1928."

It is from this judgment that the appellant appeals.

II.

SPECIFICATIONS OF ERRORS.

In perfecting its appeal the appellant assigned the following errors:

(Title of Court and Cause.)

"Assignment of Errors.

"Comes now the Pacific Coin Lock Company, a corporation, and in conjunction with and as a part of its appeal herein to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment of the court entered on the 20th day of June, 1928, tenders and files this its assignment of errors, to-wit:

"1. That the District Court erred in determining that the evidence is sufficient to sustain or justify the finding 'that the plaintiff acted promptly and immediately brought suit against defendant for damages for breach of contract' when the evidence is insufficient to sustain or justify said decision.

"2. The District Court erred in determining that the evidence was sufficient to sustain or justify the finding or conclusion of law "that as the defendant did not take advantage of the favor of the plaintiff to furnish it locks as needed, as the situations arose, defendant, by its conduct, condoned them and the plaintiff acted promptly when the defendant terminated the contract, which in its judgment gave it cause for complaint, while on the other hand the defendant by its course of conduct in the face of complaint substantially condoned the faults of plaintiff,' when the evidence is insufficient to sustain or justify said finding.

"3. The District Court erred in determining that the complaint permitted or the evidence is insufficient to sustain or justify the finding 'that on April 3, 1923, the defendant had in its possession 604 locks chargeable to it at $5.00 each for the last six months of 1923,' when the complaint and the evidence is insufficient to sustain or justify the said finding.

"4. The District Court erred in determining that the evidence is sufficient to sustain or justify the finding or conclusion of law 'that the defendant did, when it gave notice of termination on April 23, 1923, terminate the contract as of December 31, 1923, instead of June 30, 1923, as it sought to do,' when the evidence is insufficient to sustain or justify the said finding.

"5. That the District Court erred in determining that the complaint and the evidence is sufficient to sustain or justify the finding or conclusion of law 'that plaintiff is entitled to recover damages on the basis of rentals on the locks for the second half of the year 1923 for 604 locks chargeable to the defendant on April 23, 1923, at $5.00 each, amounting to $3020.00,' when the complaint and the evidence is insufficient to sustain or justify the said finding.

"6. That the District Court erred in making the judgment entered herein on the 20th day of June, 1928, in that the said judgment is not supported by the evidence; nor by the complaint.

"7. That the District Court erred in entering the said judgment entered herein on the 20th day of June, 1928, in that the said judgment is not supported by the conclusions of law, nor authorized by the complaint.

"8. The District Court erred in denying the defendant's action upon its counterclaim.

"9. The District Court erred in denying the defendant's motion for a non-suit at the conclusion of the plaintiff's evidence.

"10. The District Court erred in signing and filing amended findings of fact and conclusions of law on the 10th day of May, 1928, when heretofore, to-wit: on the 6th day of April, 1928, it had already signed and filed findings of fact and conclusions of law herein.

"11. The District Court erred in making findings Nos. 9 and 10.

"12. The District Court erred in making conclusions of law Nos. 1, 3, 4 and 5.

"13. The District Court erred in admitting into evidence over the defendant's objection Plaintiff's Exhibit 21. Exhibit 21 purports to be a statement of locations under contract to Pacific Coin Lock Company for pay-toilet service as of April 23, 1923. It purports to show the date of contracts with various lock users, the expiration of these contracts, the number of locks used under each particular contract and the number of unexpired years under each particular contract.

"16. The District Court erred in overruling the defendant's objection to the following question propounded to the witness Van Cleave, 'You may state to the court what was stated between you and Mr. Miller upon that subject.' A. 'Mr. Miller asked me if I wouldn't modify the contract, wouldn't consent to a provision of the contract whereby they would not forfeit the business in the event they discontinued the use of our locks; I told him no.'"

III.

QUESTIONS.

There are three major propositions before this court for its decision.

1. Did the appellee properly allege and prove the damages awarded it by the lower court?

2. Did the court err in failing to grant the appellant damages on its counterclaim?

3. Are the findings of fact and conclusions of law drawn in proper form and do they support the judgment?

It is the contention of the appellant that the appellee not only failed to prove any damages but also failed to allege any facts upon which damages might be based.

The court erred in admitting the matters found in assignment of error Nos. 13 and 16 as they were irrelevant and not within the issues as framed by the pleadings.

It is also the contention of the appellant that it not only proved a breach on the part of the appellee of its covenants, but that appellant was damaged by virtue of the appellee's breaches and that it properly alleged and proved these damages.

The court tried the case on the theory of an equity suit and awarded special damages as if specially pleaded and proved. The court's judgment is based upon amended findings of fact which are inconsistent, not within the issues, contradictory and conflicting, as pointed out in the assignment of errors and as shown by a perusal of findings V and VI.

The matters mentioned above are the questions upon which this appellant appeals.

ARGUMENT.

I.

The Amended Complaint Fails to Properly Allege Any Facts or Damages Upon Which the Court Would Have Been Justified in Giving Its Judgment for the Rental Value of Locks Used by the Appellee.

In the first place it must be remembered that the appellee commenced its action by a bill in equity, No. G101, wherein it sought to do three things:

First: To enjoin the appellant from detaching any locks from any location upon which they been installed.

Second: To require the appellant to account to the plaintiff for all of the rentals due and all of the sums due the defendant under lease contracts then in existence.

Third: To have an interlocutory receiver appointed to take over the business of the appellant until the matters in dispute should have been adjudicated.

The lower court, Judge Bledsoe presiding, decided that the appellee had no interest in the business of the appellant. Therefore neither the value of the lock locations nor the rental values of the subleases could be the basis of the measure of damages. And the decision of Judge Bledsoe's court became binding upon the lower court which tried this law action. In other words it became the law of the case. This proposition is well supported by the authorities and the language of the court is most emphatic. In the case of Commercial Union of America v. Anglo-South American Bank, 10 Fed. (2nd) 937 at 939 the court says:

"In Wakelee v. Davis, 44 F. 532, Judge Coxe sitting in the Circuit Court for the Southern District of New York in 1891, in a case which had been twice before the court on demurrer, said:

'The propositions of law presented are the same now as on demurrer. Some testimony has been taken pro and con, but, upon all important questions, it is substantially conceded that the legal aspects of the case remain unchanged. It is true that in deciding the issues presented by the demurrer the court spoke through another judge, but the law there enunciated is not merely the individual opinion of the judge who presided; it is the law of this court, to be followed, upon similar facts, until a different rule is laid down by the Supreme Court. A re-examination and discussion of the question involved is, therefore, unnecessary, for the reason that the court is constrained to follow its former decision.' "

In Shreve v. Cheesman, 69 F. 785, 790, 16 C. C. A. 413, 418, Judge Sanborn, writing for the Circuit Court of Appeals in the Eighth Circuit, in 1895, said:

'It is a principle of general jurisprudence that courts of concurrent or co-ordinate jurisdiction will follow the deliberate decisions of each other, in order to prevent unseemly conflicts, and to preserve uniformity of decision and harmony of action. This principle is nowhere more firmly established or more implicitly followed than in the circuit courts of the United States. A deliberate decision of a question of law by one of these courts is generally treated as a controlling precedent in every Federal Circuit Court in the Union, until it is reversed or modified by an appellate court.' Striking illustrations of this principle will be found in Vulcanite Co. v. Willis,

1 Flip, 389, 393, Fed. Cas. No. 5, 603, in which Judge Emmons said in these courts: 'They constitute a single system; and when one court has fully considered and deliberately decided a question, every suggestion of propriety and fit public action demand it should be followed until modified by the appellate court. * * * So great, however, is the importance I attach to uniformity of decision by courts of coordinate jurisdiction, that I feel constrained to adopt the rule thus established in the several districts in which these cases arose. It seems more important that the rule should be uniform and certain than that it should be consistent with principle'; Welle v. Navigation Co."

To the same effect is Wakelee v. Davis, 44 Fed. 534, wherein it was held that (p. 532):

"A decision on demurrer is the law of the case until a different rule is laid down by the supreme court, although such decision was rendered by another judge than the one trying the case finally."

And the following cases support this rule:

Presidio Mining Co. v. Overton et al., 261 Fed. 933, 939;

Taylor v. Decatur Co., 112 Fed. 449;

Shreve v. Cheesman, 69 Fed. 785;

Reynolds et al v. Iron Silver Mining Co., 33 Fed. 354.

Judge Henning recognized this principle by refusing to give the appellee the value of the locations or the rental value of the subleases, but gave the appellee damages based on the rental value of the locks for the remaining term of the contract, i. e., for a six months' period, although the complaint was framed on the theory that

appellee was entitled to the value of the locations and the rental value of the subleases. In other words, it was a complaint framed on an equity theory attempting to recover equitable relief in a court of law. This is more apparent when paragraphs seven, eight and nine and the prayer of the complaint are examined. They are as follows:

> "Seventh: Plaintiff further alleges that by reason of defendant's said breaches of said contract hereto attached, and marked 'Exhibit A,' plaintiff is entitled to the value of all the lease contracts in existence on April 23, 1923, between the defendant and all other persons, firms or corporations covering coin locks installed by defendant in the states of California, Washington, Oregon and Texas, as plaintiff's stipulated damages fixed by paragraph 6 of said contract, 'Exhibit A,' which lease contracts plaintiff is informed and believes, and on said information and belief alleges the fact to be, are of the reasonable value of one hundred thousand dollars ($100,000). That it would be and was and is impracticable or extremely difficult to fix the actual damages so fixed in said paragraph 6 of said contract, 'Exhibit A.'
>
> "Eighth: *Plaintiff further alleges that the defendant has in its possession 183 locks* belonging to the plaintiff and although requested so to do by plaintiff, defendant has failed and refused, and continues to fail and refuse to deliver said locks to plaintiff. *That the reasonable value of said locks is twenty-five ($25.00) dollars each for the said 183 locks.*
>
> "Ninth: That by reason of the breaches of the said contract, 'Exhibit A' hereto attached, which said breaches are heretofore set forth, plaintiff is

entitled to all of defendant's interest in the coins that were in the locks described in paragraph seventh of this complaint on April 23, 1923, and that have since been deposited therein, which said interest is fixed as plaintiff's liquidated damages by paragraph 9 of said 'Exhibit A,' and amounts, as plaintiff is informed and believes, and on said information and belief alleges the fact to be, to the sum of twenty-five thousand dollars ($25,000.00). That it would be and was and is impracticable or extremely difficult to fix the actual damages so fixed as liquidated damages.

"Wherefore, plaintiff prays:

"That it have judgment for the sum of one hundred thousand ($100,000.00) dollars, the value of contracts described in paragraph seventh hereof; for the sum of four thousand five hundred and seventy-five ($4,575.00) dollars for the value of locks retained by defendant as alleged in paragraph eighth hereof; for the sum of twenty-five thousand ($25,000.00) dollars for the value of defendant's interest in the coins described in paragraph ninth hereof; and for costs of suit and for such other and further relief as to the court may seem just."

An analysis of the appellee's complaint discloses three alleged grounds for damages.

1. The value of the lease contracts between the appellant and other persons covering locations; in other words, the value of the lock locations.

2. The value of the locks themselves alleging 183 locks in the possession of appellant at a value of twenty-five ($25.00) dollars each.

3. Twenty-five thousand ($25,000.00) dollars as liquidated damages.

The judgment rendered by the court is for the rental value of 604 locks at $5.00 per lock or $3020.00, but without costs. Nowhere in its complaint does appellee allege more than 183 locks to have been in the possession of the appellant and fails to allege any rental for the same, but demands judgment for the reasonable value of the locks. It was stipulated at the trial that all of the locks had been returned by April 23, 1928, and so found by the court in finding No. IX.

Damages flowing from the breach of the contract resulting in the loss of the rental value of the locks is a form of special damages which must be specially pleaded as such before evidence can be introduced on the subject as a basis for recovery.

Under Section 724 of the United States Judicial Code the rule is well settled that:

> "In action at law, the sufficiency and scope of pleadings are matters in which the Federal Courts of the United States are governed by the practice of the courts of the state in which they are held." 28 U. S. C. A. Sec. 724, p. 36, and supporting cases.

Glenn v. Sumner, 132 U. S. 152, and in Central Vmt. Ry Co. v. White, 238 U. S. 507, 511, it was said:

> "There can * * * be no doubt of the general principle that matters respecting the remedy—such as the sufficiency of the pleadings * * * depend upon the law of the place where the suit is brought."

The purpose of the section is stated in Liverpool etc. Ins. Co. v. N. & M. Friedman Co., 133 Fed. 713, 716, as follows:

> "That the object of the section was to assimilate the form and manner in which parties should present their claims and defense, in the preparation of the trial of suits in the federal courts, to those prevailing in the courts of the state."

Even with these general principles to guide us the rule is apparent, but we have before us a case which decides the very point in issue here, namely, the case of Monarch Tobacco Works v. American Tobacco Co., 165 Fed. 774, in which it was held that where the practice in a state is that if the damages claimed are such as would usually or naturally accompany or follow or be included in the results of the injuries complained of, they may be stated or claimed in general terms, but that other and further damages can neither be proved nor recovered unless expressly averred and shown, such practice will be followed in a federal court sitting in that state.

In other words, special damages must be properly alleged before they can be proved and recovered.

Under the general principles laid down by the cases *supra* it naturally follows that if the practice of the state court requires special damages to be pleaded specially before proof and recovery thereon the federal courts must apply the same rule. With this in mind we turn to an examination of the rules of pleading practiced in the state of California as the California rule governs in this matter. The general proposition that special

damages must be specially pleaded before proof and recovery is well expressed in 8 Cal Juris. 889, Sec. 127, as follows:

> "Special Damages.—The defendant cannot be presumed to be aware of the damage naturally, though not necessarily, resulting from his act, and therefore, in order to prevent a surprise on him, this sort of damage must be specially set forth in the complaint, or the plaintiff will not be permitted to give evidence of it. Notwithstanding the fact that the code fixes the limitations of recovery as a measure of general damages common to actions for breaches of certain contracts, it is a well-recognized rule of law that recovery may be had for damages not covered by the general liability for breach of contract, where facts are specifically pleaded showing that the injury was one reasonably within the contemplation of the parties. The facts as to special damages must be stated with particularity, the amount of such damages must be given, and the means of occasioning them must be set forth. Whenever the special damages do not all flow from the same facts, but depend upon proof of different circumstances, the grounds of each claim should be alleged. An allegation that by reason of the breaches of contract the party has been damaged in a named sum, is not enough.
>
> "It is only damages which are not the necessary result of the injuries complained of which must be specially pleaded. Where the gist of the action is special damages, and these are inadequately pleaded, only nominal damages can be had."

This rule is supported by a host of authorities, among which are the following:

Huyler's v. Ritz Carlton Hotel etc., 2nd Fed. 404;
17 C. J. 1002, Sec. (306) 307;
Roberts v. Graham, 18 L. Ed. 791;
Martin v. Pac. Gas & Electric Corp., 52 C. A. D. 882, 889;
Gavey v. Reed, 178 Cal. 749;
Mills v. San Diego Conservatory of Music, 47 Cal. App. 300;
Cohn v. Bersemer Gas Engines Co., 44 Cal. App. 85.

Having established the proposition that the federal court sitting in this district must follow the rules of pleading established in California courts, and having further demonstrated that both Federal and California law require that special damages must be specially pleaded in every particular, we naturally come to the question of what are special damages.

In the case of Martin v. Pacific Gas and Electric Company, cited *supra*, the court, at page 889, defines special damages as follows:

> "Special damages are those which are the natural but not the necessary, result of the act complained of, and not being implied by law must be specifically pleaded and proven."

In the case at bar the appellee was awarded the rental value of the locks for the second half of 1923. The loss of the rents for the locks for the second half of the year 1923 was a natural but not necessary result of the alleged breaches of the contract by appellant. In fact,

the appellee fails to allege anywhere in its complaint that the appellant refused to pay the rents due on the locks. There is nothing in the pleadings to show that the appellant ever failed to pay the rents due under the contract, *non-constat*, but all the rents due were paid.

The loss of rents was not the necessary result of the breaches alleged by the appellee, and that the appellee did not think so, is apparent from the fact that it did not even take the truble to plead loss of rents, but contended itself with pleading a conversion of 183 locks by the appellant and set the reasonable value of the same at $25.00 per lock.

Conceding for the sake of argument that the contract was terminated as found by the court on the 30th day of December, 1923, by the notice given on July 1st, 1923, it did not necessarily follow that the rents due for the second half of the year 1923 would not be paid on the locks in the possession of the appellee at the date of notice of termination on April 23, 1923. And unless it followed necessarily and as a matter of course, that upon the breach of the contract by the appellant the rents on the locks would not be paid, the recovery of such rents must be by properly pleading the loss of rents as special damages.

Illustrations of special damages are found in 8 Cal. Juris., 751 Sec. 21:

> "Illustrations of Special Damages.—Damages for breach of contract which are special in their character include such as the following: Loss of rents resulting to the owner from a contractor's failure to complete a building in time; damages claimed by

a purchaser solely on account of the seller's delay in delivery; damages for the breach of a warranty of fitness for a particular purpose, as prescribed in Section 3314 of the Civil Code; expenses incurred by a vendee in examining title and preparing papers, following the vendor's breach of agreement to convey land; attorney's fees, provided by a contract to be paid in case of suit for its breach; attorney's fees paid by an owner in freeing his building from mechanics' liens which the contractor had allowed to be filed in violation of the building contract; attorney's fees and other expenses incident to procuring a release from false imprisonment. And where one agrees to buy land at tax sale and hold it in trust for the owner, but violates the agreement by selling the certificate of sale to a third person who sues the owner to quiet title, counsel fees and other expenses incurred by the owner in defending the suit are special damages. Likewise, where a contract to construct a railroad across the land of one of the parties and to the center of an adjacent city is broken, the damage resulting to the land owner from the deprivation of the convenience of communication with the center of the city is in the nature of special damages."

To the same effect is Howard Supply Co. v. Wells, 176 Fed. 512.

In every jurisdiction, whether state or federal, the rule is followed that special damages must be specially pleaded by setting up the facts showing how the injury occurred, and the nature and extent of the loss resulting from the breach of the contract.

In the instant case the appellee fails to allege any loss of rentals and the law will imply none. Having

failed to allege any special damages the appellee was precluded thereby from introducing into evidence any proof as to loss of rentals on locks and it was error for the court to admit any evidence to prove the rental value of the locks for any period of time.

Not only did the appellee fail to allege special damages as to the rental value of the locks, but it failed to allege any general damages.

Under the definitions of general and special damages, the allegation of damages contained in the seventh paragraph of appellee's amended complaint, allege special damages in the sum of $100,000 for the loss of contracts procured by the appellant for its own business. Certainly the alleged loss of these locations could not constitute general damages flowing from the alleged breaches of the contract between appellant and appellee. For if the lock locations were rightfully the property of the appellee (which they were not) to revert to it only on the breach of the contract, how could the loss of the same necessarily and naturally flow from the breach. In other words, the breach of the contract by the appellant was a necessary condition precedent to the right of the appellee to the lock locations.

Paragraph eighth of appellee's complaint also sets up special damages alleging the loss of locks and the value of the locks. It is clear that a breach of the contract would not naturally and necessarily result in the loss of these locks.

Paragraph ninth is an attempt to allege liquidated damages and hence could not possibly be construed as an allegation of general damages.

In the prayer the appellee segregates the items of damages as special damages, but makes no allegation of general damages. Hence we find that all of the allegations of damages and the prayer are for special and not general damages and the appellee is barred from even attempting to justify its award of $3020.00 under the guise of general damages because there is no allegation of general damages. Having carefully and expressly delineated the special items upon which it bases its recovery and having assigned to each item special damages of fixed amounts, the appellee is precluded from recovering for items not set out in the complaint nor contained in the prayer.

II.

By Failing to Allege the Loss of the Rental Value of the Locks, Either as General or Special Damages, the Appellee Was Precluded From Introducing Any Evidence as to the Loss of Rents From the Locks.

The cases cited *supra* all hold that the proper pleading of damages is a necessary prerequisite to the introduction of evidence to prove the same.

The only allegation in the complaint referring to the number of locks in appellant's possession at the time of the alleged breaches is paragraph eight of said complaint which fixed the number at 183. Under the terms of the agreement appellant has allowed 100 locks free which would reduce the number of rent locks to 83. At the trial the appellee, over the objection of the appellant, [See Tr. p. 536, and assignment of error No. 13, Tr. p. 663], introduced a document numbered Plaintiff's Ex-

hibit 21 [Tr. p. 536] which purported to show the number of locations under contract with the appellant. The number of locks shown by this document to be in the possession of the appellant on April 23, 1928 was 604 locks. This number was in excess of the number alleged in the complaint to wit: 183 locks. The appellee made no application to the court for its order permitting it to amend the complaint to conform to proof and at the time the findings of fact and conclusions of law and the judgment was signed this variance between proof and allegation remained and amounted to a judgment in excess of and different from the prayer which constitutes reversible error; for a recovery for rent is not the same cause of action as a recovery for the value of the thing rented. The rule is well stated in Meisner v. McIntosh, 76 C. D. 213, 214, as follows:

> "By the complaint the plaintiff sought to recover damages for fraudulent representations made by the defendants whereby he was induced to convey certain real property of the fair market value of $1,000.00. There was evidence produced at the trial to the effect that said real property was of the fair market value of $1,525.00. The trial court found in accordance with this evidence and rendered judgment in favor of plaintiff for this amount together with other amounts hereinafter referred to. No amendment to the complaint to conform to this evidence was made or filed. Appellants contend that as the plaintiff alleged that he was damaged only in an amount of $1,000.00, it was error for the court to find, and upon such findings to award a judgment in the sum of $1,525.00, or in any amount exceeding the sum of $1000. In this we think appellants

> are right. The authorities overwhelmingly support appellants' contention. 'The rule is firmly established that irrespective of what may be true a court cannot decree to any plaintiff more than he claims in his bill or other pleading.' "

Where the case proved is found to be essentially different from that presented by the pleadings there is a failure of proof and the defendant is entitled to a non-suit. The rule is well stated in 21 Cal. Juris. 267, Sec. 185.

> "Failure of Proof.—Where the allegation of a claim or defense to which the proof is directed is unproved, not in some particular or particulars only but in its general scope and meaning, there is not a case of variance, but a failure of proof. So, if the case as proved and found is essentially different from that presented by the pleadings, there is a failure of proof and a defendant is entitled to a non-suit or to the reversal of judgment against him, even though the objection might have been obviated by amendment. In an action upon a note alleged to have been executed to a firm, proof that it was executed to and is due to one of the partners constitutes a failure of proof. Likewise, where the complaint alleges an agreement to pay a designated sum of money for services and the evidence discloses that the contract was that plaintiff should accept a certain number of shares of stock in full compensation for such services, there is a failure of proof."

In the case at bar the appellee introduced Exhibit 21 to show the value of the subleases (not the rental value of the locks) and the court used it as a basis for computing the rental value of the locks for the last half of

the year 1923, but failed to even deduct the 100 locks which were allowed rent free. There was no allegation as to the rental value of the locks and the court permitted proof which it used to compute the rental value of the locks. Here was a complete failure of proof of one of the issues of the case. Paragraph eight of appellee's complaint was an attempt to recover the actual value of 183 locks and the court gave it judgment for the rental value of 66 locks, even though the contract provided that appellant was to have 100 locks rent free. This fact alone is sufficient to reverse the judgment.

In view of the fact that it was stipulated by the parties in open court at the beginning of the trial that all of the 183 locks had been returned to the appellee, a recovery of the appellee under paragraph eight of its complaint was certainly out of the question and the complaint from that time must be considered as if paragraph eight did not exist. Upon what theory could the court have admitted Exhibit 21 certainly not to show the value of the subleases and contracts because this would clearly be done in the face of the decision of Judge [illegible] and the findings of the trial court?

There was no possible theory upon which it could have been properly admitted and upon this Exhibit 21 rests the whole basis of the court's decision and judgment.

[illegible] the admission of that exhibit was prejudicial to the rights of the appellant cannot be denied for without this exhibit the court could have been unable to make the finding as it did. [illegible] of the evidence Exhibit 27 [illegible] the number of [illegible] to the [illegible] April 23, 1923

It is well settled that where evidence is admitted over the objection of the adverse party, that it is irrelevant and not within the issues, it is reversible error where the admission of the same is prejudicial to the rights of the party objecting.

> "Evidence is confined to material allegation. Evidence must correspond with the substance of the material allegations, and be relevant to the question in dispute. Collateral questions must therefore be avoided. It is, however, within the discretion of the court to permit inquiry into collateral fact, when such fact is directly connected with the question in dispute, and is essential to its proper determination, or when it affects the credibility of a witness."
>
> Mitchell v. Beckman, 64 Cal. 116;
> Coonan v. Lowental, 129 Cal. 197;
> Estate of Noyes, 11 Cal. 143;
> Martin v. Pac. Gas & Elec. Corp., 52 C. A. D. 882;
> 10 Cal. Jurs. 797.

Where the evidence admitted is a basis of the court's decision and judgment and there is no request made or leave granted for an amendment to conform to proof, the action of the court in giving judgment for damages computed on the basis of the irrelevant testimony and not pleaded is a combination of errors, any one of which would reverse the judgment.

Evidence admitted for a special purpose over objection to its admissibility cannot subsequently be used for another and different purpose irrelevant and not within the issues.

> Estate of Noyes, *supra;*
> 21 Cal. Jur. 2d Sec. 185.

the year 1923, but failed to even deduct the 100 locks which were allowed rent free. There was no allegation as to the rental value of the locks and the court permitted proof which it used to compute the rental value of the locks. Here was a complete failure of proof of any of the issues of the case. Paragraph eight of appellee's complaint was an attempt to recover the actual value of 183 locks and the court gave it judgment for the rental value of 604 locks, even though the contract provided that appellant was to have 100 locks rent free; this fact alone is sufficient to reverse the judgment.

In view of the fact that it was stipulated by the parties in open court at the beginning of the trial that all of the 183 locks had been returned to the appellee, a recovery of the appellee under paragraph eight of its complaint was certainly out of the question and the complaint from that time must be considered as if paragraph eight did not exist. Upon what theory could the court have admitted Exhibit 21, certainly not to show the value of the subleases and contracts because this would clearly be error in the face of the decision of Judge Bledsoe and the findings of the trial court.

There was no possible theory upon which it could have been properly admitted and upon this Exhibit 21 rested the whole basis of the court's decision and judgment.

That the admission of this exhibit was prejudicial to the rights of the appellant cannot be denied for without this exhibit the court would have been unable to render the judgment it did. In the state of the evidence Exhibit 21 was essential to a computation of the number of locks in the defendant's possession on April 23, 1923.

It is well settled that where evidence is admitted over the objection of the adverse party, that it is irrelevant and not within the issues, it is reversible error where the admission of the same is prejudicial to the rights of the party objecting.

> "Evidence confined to material allegation. Evidence must correspond with the substance of the material allegations, and be relevant to the question in dispute. Collateral questions must therefore be avoided. It is, however, within the discretion of the court to permit inquiry into collateral fact, when such fact is directly connected with the question in dispute, and is essential to its proper determination, or when it affects the credibility of a witness."

Mitchell v. Beckman, 64 Cal. 116;
Coonan v. Lowenthal, 129 Cal. 197;
Estate of Boyes, 151 Cal. 143;
Martin v. Pac. Gas & Elec. Corp., 52 C. A. D. 882;
10 Cal. Juris. 797.

Where the evidence admitted is a basis of the court's decision and judgment and there is no request made or leave granted for an amendment to conform to proof, the action of the court in giving judgment for damages computed on the basis of the irrelevant testimony and not pleaded is a combination of errors, any one of which would reverse the judgment.

Evidence admitted for a special purpose over objection to its admissibility cannot subsequently be used for another and different purpose irrelevant and not within the issues.

Estate of Boyes, *supra;*
21 Cal. Juris. 267, Sec. 185.

In concluding this branch of the case it might be well to call the court's attention to the well known rule of law that when a complaint fails to allege special damages and fails to prove or allege general damages the plaintiff is only entitled to nominal damages provided the complaint states a cause of action.

III.

The Court Erred in Giving Judgment for the Appellee and Should Have Given Judgment to Appellant on Its Counterclaim.

Under this heading the first question to decide is whether or not the appellee in any way breached its covenants and acted promptly in bringing this suit.

Finding No. VI of the amended findings [Tr. p. 39] is as follows:

> "That under the terms and conditions of said contract the plaintiff guaranteed its lock as to material, workmanship and repair and agreed specifically to lease defendant additional locks as needed. Plaintiff failed from time to time in living up to its agreement. The defendant, however, did not take advantage of these situations as they arise from time to time."

Finding No. X is as follows:

> "That plaintiff acted promptly and immediately brought suit against defendant for damages for breach of contract."

And from these findings the court comes to the following conclusion found in conclusion of law No. I:

> "That as the defendant did not take advantage of the failure of the plaintiff to furnish to it locks as needed as these situations arose, defendant by its conduct condoned them and the plaintiff acted promptly when the defendant terminated the contract which in its judgment gave it cause for complaint, while on the other hand the defendant by its course of conduct in the face of complaints substantially condoned the faults of plaintiff."

Did the appellee substantially comply with its contract? The appellant most emphatically contends that the plaintiff not only did not substantially comply with its contract, but that it committed a breach of the contract because of which breach the defendant gave notice of termination on April 23, 1923.

The court finds that the appellee shipped locks from time to time, or, in the words of the court, "That at various and sundry times from and after the said February 23, 1915, plaintiff delivered to the defendant, Pacific Coin Lock Company, large numbers of coin locks * * * to be used by said defendant, Pacific Coin Lock Company, in accordance with the terms and conditions of the aforesaid contract.'

We pause here to point out to the court that this finding does not find that the appellee delivered locks in accordance with the terms of the contract, but that the plaintiff delivered locks to be used by the defendant in accordance with the terms of the contract. The defendant was to use them *in accordance* with the terms of the contract.

This cannot be construed to mean that the appellee complied with its contract because the following finding of fact No. VI recites that the appellee breached the contract

However, even if the appellee had promptly shipped the locks as needed by the appellant upon its orders, still this would not constitute substantial performance, because the contract also provided that the locks were guaranteed by the appellee as to material and workmanship, and unless the locks were made of the proper materials and contained the proper workmanship the plaintiff failed to perform.

The appellee admitted that all of the parts were not interchangeable and not properly machined. Delbert Cosby and his brother, Halley Cosby, witnesses for the appellee and in its employ, admitted that they had to work on the locks before installing them and that the parts were not interchangeable and had to be worked over before they fitted.

[Tr. p. 559]:

"Q. I call your attention to this language: 'The parts are not standard. Tried to change some cases and knobs, but was out of luck.' Was that one of the troubles you found with the locks?

"A. Those locks I could not change without putting on new locks.

"(Witness continuing): The parts were not standard,—this is, you couldn't always interchange one latch with another one. I didn't find that to be true of all of them.

"Q. I will call your attention to this language, and will ask you to look at the bottom of the page, beginning at the words,—'Several little defects and believe me I mentioned them in writing Malsbary,—' He was the secretary of the Coin Controlling Lock Company?

"A. He was.

"Q. (Continuing reading): 'No use putting on these new locks until they are right, but I begin to think they never will get them right, and about the only lock on the market that is right is the Pawtucket lock, and it's too bad we are not using it.' What did you mean by that?

"A. I always had great praise for the Pawtucket lock.

"Q. What did you mean by the phrase, 'I think they will never get them right'?

"A. I was very much in favor of the Pawtucket lock, and thought they were making somewhat of a perfect lock.

"(Witness continuing): I never said the Coin Controlling Lock Company's lock would not be right. I never said it either verbally or in writing that I recall.

"Q. Now, I will call your attention to this language: 'The locks did not get here until about noon today, and I had to go over all of them, and when I got through packing, etc., the day was gone.' "

And to the same effect is the letter of Van Cleave, president of the appellee company, thanking the appellant for pointing out to appellee the glaring defects in its locks both as to material and workmanship.

Mr. Hervey, one of the best experts in the Coin Lock business, testified on the stand that the locks furnished the appellant by the appellee were made of the wrong materials, not machined nor properly constructed.

Mr. Hervey pointed out that the back of the lock being aluminum sprung if the door was warped or was slammed

shut, causing the parts to bind and subsequent failure of operation. [Tr. pp. 478-487.]

"My name is Lee Hervey. I reside in Baltimore, Maryland. I am connected with the General Service Company. The business of that company is manufacturing coin locks. We also distribute them. The place of business of that corporation is Baltimore, Maryland. The territory occupied by the company is national and international. Our factory is in Pittsburg, Pennsylvania.

"I have been in the coin lock business since 1910. My first connection with the coin lock business was an operative contract with the American Sanitary Lock Corporation, Indianapolis, in 1910,—in which they furnished coin locks, obtained the locations, installed in, operated in, and they received 50 per cent of the income. In 1912 I operated some locks made by the Itaska Company of Chicago, which I purchased outright. They were not successful, and I organized and took over in 1917 or 1918 the General Service Company, and started building our own equipment, installing and operating it, which we are doing today. During that time, I have familiarized myself with practically every lock manufactured in this country, including all the records and patents on them, going back to 1874. I have made studies of the coin lock business. The first two locks installed were installed around 1903. They were manufactured in England. They were brought here and installed in Boston. The first locks of American manufacture were installed around 1905 or 1906, by the Pawtucket people, I believe. I am familiar with the Pawtucket lock. I have made a study of the construction of coin locks.

Q. By Mr. Newby: I show you Plaintiff's Exhibit A-9, and ask you if you have made an examination at our request of that lock? A. Yes, and previous to your request.

Q. You have examined the locks of the Coin Controlling Lock Company, or the Michigan Coin Lock Company? A. A great many of them over a period of years.

(Witness continuing): I have familiarized myself with the locks they distribute.

Q. And can you tell from an examination whether that is one of them? A. That has no name on it, but it looks very much like one; I would say, yes.

Q. By Mr. Newby: I will ask you to examine it and see if it has any indication of having all the parts that are usual in locks put out by the Coin Controlling Lock Company and the Michigan Coin Lock Company. A. At that time, yes—along around 1917, 1918 and 1919, 1920 and 1921.

(Witness continuing): They have put out about ten different locks that I know of, and possibly more.

Q. If you will, just describe to the court the construction and wherein there are any defects. A. The defects are in the material used.

(Witness continuing): It is a soft aluminum, and a rule of mechanics is that soft aluminum working against hard brass, which is a harder metal, will wear until it becomes loose, and as it becomes loose it allows play between the parts. This particular lock is a fairly well complicated lock of its particular type. Fundamentally, from the standpoint of the manufacturer, it can never be satisfactory, because it is a combination of one hard metal with a soft metal without any bushing.

The Court: Let me interrupt. The warranty of the contract is workmanship and material, is it not?

Mr. Newby: Yes.

(Witness continuing): The grades of brass in this lock are different, some are about 30 per cent copper, and I should judge the others are about 22 per cent, which is a question of difference in hardness and softness.

Q. By Mr. Newby: Will you please indicate the portions that are of different metals that you describe? A. This templet of the handle arm, and ward, which is the sliding bolt of this arm, a very important factor,—this is very soft. Do you want me to demonstrate how soft it is?

Q. You say this, What are you referring to? A. The sliding ward. Would you like for me to demonstrate how soft this is?

(Witness continuing): Any piece of metal to stay in shape, ought to be of hard construction, so it won't flex in the slamming of doors or putting in the coin. That little tiny piece has to carry the pressure of the coin between the two slots that allows the handle to turn, to move the coin over and move this ward back and forth,—the combination of the two slides.

Q. By Mr. Newby: Now you have heard some witnesses describe an operation that is quite frequent, that it would jam and lock the party in the toilet. Will you explain to the court how that result would follow from the use of that lock? A. This flexible ward that I explained to you here, will bind and one coin can get in here, and if there is a little softness another coin can get on top and jam and the mechanism cannot be moved, because that is the movable part of the top, and this is the immovable,

and if you can't move them together, that ward is locked.

Q. And that is the effect of the lock part inside? A. Yes. In other words, in this construction of a coin lock, the coin acts as a wedge between the two, and in the general construction of locks today, it does not act as a wedge, merely as a pall, it slides in and the pressure does not come on the coin.

Q. In this particular lock, pressure does come on the coin? A. Yes, there is the lower half of the nickel, and that is the upper half of the nickel. That is the position the nickel goes in. In turning this handle, this comes in contact with the nickel, this arm coming up, and if that bends and doesn't come in contact, you don't move. That goes over and comes in connection with the ward and that takes this ward along,—watch it go in. (Demonstrating.) That is all the action.

Q. By the Court: I take it what you desire to say is if there is a defect and if the brass is too soft that is what will happen? A. That is one of the defects.

Q. By the Court: Is brass essential to that construction? A. No, any hard metal would have sufficed. Brass is usually used of a proper consistency, because of its easy milling.

(Witness continuing): Brass is non-rustable, non-corrodible. Aluminum is the reverse. This piece is aluminum, cast, and could be polished up just as nice as anyone would want to see it, but it won't stay so, and very few lock manufacturers of the better grades of locks use aluminum. They use brass, or steel; preferably brass. Steel is much cheaper than aluminum.

Q. By Mr. Newby: What would be the advantage of using aluminum over steel? A. Because you couldn't polish steel like aluminum; you would have to nickel plate it and would have to copper plate it and that would cost more than aluminum.

(Witness continuing): That would cost more than aluminum and it would be much harder to work. Aluminum and brass are the two simplest castings to make. They don't require the same extreme heat to melt. They are harder to work. These are easy to work. Aluminum and brass work four times as easily as the harder metals.

Q. By Mr. Newby: Will you also continue in your detailed examination of this lock with reference to the machining? A. There is practically no machining in this lock.

(Witness continuing): Machining means fitting. That is universal, so one can be taken out and another put in the same place. Ford car idea, everything interchangeable. In a business of this kind it is quite essential to have standard parts because to talk about having a coin lock, like we have, 1500 in Siam and they order parts and when they get there they are not usable, they might as well not order them.

Q. By Mr. Newby: As a practical matter the parts not being interchangeable, what does the operator have to do? A. He has to mill them and file them and scrape them and do everything else until it does operate.

(Witness continuing): Sometimes they never operate.

Q. Is that proper workmanship? A. No, sir, it is not proper workmanship. It is very crude, pitifully crude.

Q. With reference to that latch, you said pitifully crude, and you looked at something else,— A. I am not trying to pick it to pieces, just looking at the general construction of it; the whole thing is crude.

Q. With reference to that latch there, the part that goes into the door, do you notice any defects there? I don't know whether I have the correct name. That there (indicating). A. That is termed by different names. Some people call it the latch and some call it the ward. This is hand filed, I can see that. It is not a fabricated piece of metal. It is like the barn door latch, they will keep on working if you keep on working on them.

Q. As to the weight of that metal upon which the inside is attached, does that have anything to do with the operation of the lock? A. No, the weight of it wouldn't have much to do with it; the tensile strain would.

Q. In what respect? A. That it couldn't flex. The second this is put up and screwed up on the door, if this back flexes out of line, everything in it binds.

Q. By the Court: In other words, rigidity would be the converse? A. Yes, it binds.

Q. By Mr. Newby: Now with reference to that particular lock, what would you say as to the probability of it becoming flexed? A. You tell me not to do anything to the lock that will affect it, and I am liable with the slightest demonstration to prove it flexes, and then it is of no value.

(Witness continuing): I don't know the strength of the metal but I can bend it right in my hand.

I have seen many of these locks in which that case has been bent. I would say that is one of the de-

fects in the workmanship of that lock. It is a combination of both workmanship and material. The material was wrong to start with, and then there was no workmanship put on it. It is a common, crude casting.

Q. By Mr. Newby: I will ask you again whether or not you ever saw any of the castings of the Coin Controlling Lock Company or the Michigan Coin Lock Company upon any occasions, and if so where? A. In the office of the Pacific Coin Lock Company.

Q. And what did you observe with reference to those parts? A. Those castings were sent out here, that I saw here, were common, crude castings without any machining whatever. For instance, that is a casting. It has been machined in two or three places. Those I saw here had not been machined in any way, and they had to be worked on. I should say by handwork two hours to each one to first go into the lock. In other words, they were castings from a foundry, sent just as cast, not finished up.

Q. Would you say that was good workmanship? A. Absolutely improper.

Q. You have heard some testimony here, Mr. Hervey, with reference to the difficulty in opening,—that they are easy to open. Does that apply to this lock or some other lock? A. You mean to open the door?

Q. To open that without putting in a nickel? A. Yes, it is very easy, very simple. You can take a knife.

Q. In what respect? A. You can go behind it. The chances are you can open them through the slot. I can do it with my knife. I can flex it with my knife.

Q. Now what preventive measures are used on other coin locks to avoid that, if any? A. Guards are mounted around here and cast in, top guards on top for swing-in locks, and face guards on the face of swing-out locks, that protects against any possibility of rifling. An entirely different principle in the modern lock is that it makes no difference what you put in the top there it shifts the palls.

Q. By the Court: By modern, what do you mean, the period of that lock? A. Yes.

Q. By Mr. Newby: Were these kind of locks you describe as modern put out as early as this lock? A. Oh, yes, the Pawtucket lock was put out in 1911. That is a very good lock. Mr. Van Cleave knows that, because he used a great many of them in leased locations.

(Witness continuing): Our company furnished Mr. Van Cleave some of our locks. In 1922 and 1923 I should say that the Pawtucket people and ourselves furnished them around 600 on lease at $1.00 per lock per month,—the Pawtucket much the larger number, because at the same time we were furnishing the other company in the Service Utility Company, the American Sanitary Lock Company, which also have a lock of this inferior manufacture, 2200. In other words, they were taken off and this other lock put on.

Q. By Mr. Newby: Would you say, Mr. Hervey, that it would be profitable as a business proposition to successfully operate locks of the type of this one that you have just examined, except at very great cost and expense? A. It could not be done; it could not be done profitably I think."

Both appellee and appellant admit that one of the best locks on the market during the period that appellant was using appellee's locks was the Pawtucket lock, the case of

which was made of steel and nickeled. The locks of the appellee was constructed with an aluminum case with bronze and brass parts working against it.

The aluminum, being softer, wore away allowing play in the working parts and consequent jamming of the locks. This was true of all the locks sent by the appellee and caused the defendant so much trouble that it had to hire a corps of men to nurse these locks along so that the patrons could use them at all.

The record is full of incidents where users of the toilets were locked in by the locks jamming and had to be helped out. And in some cases the patrons forced their way out, smashing the door and the lock.

[Tr. pp. 68-70]:

> "My name is Albert Mallory. I reside at 1500 E. 23d street, Los Angeles. I am employed by the U. P. Railway Company. I expect to leave the city tomorrow for Chicago, and be gone about eight days.
>
> In the year 1919, and the early part of 1920, I was employed at the Hayward Hotel. The Hayward Hotel is located at the southwest corner of 6th and Spring streets, Los Angeles, California. During the time that I was there there were coin locks on the doors of the toilets in the washroom of the Hayward Hotel. I came there in 1919. The locks that were on those doors were the Pacific Coin locks. My observation during the time I was there with reference to those locks was that the locks were no good, we had quite a number of complaints. The gentleman who has charge of the coin locks told me to keep down as many complaints as possible in the office. The coin would get clogged in the lock and you could not use it; several guests they would go in and they could not

get out; several guests got out over the doors, and they locked the doors and they would have to use a key to get out and I got several guests out over the doors, and sometimes they would lock people in there so many complaints would happen in the office.

Q. By the Court: Did you receive any complaints? A. Yes.

Q. By the Court: How many? You must not testify as to what they told you in the office, but of what you received yourself. A. So many times people would put 5 cents in the locks and they could not get results; it would not open the door and they could not get it; that would be times when I would not be in there.

(Witness continuing): Every day I would come back and find money in the locks, and they never could get results and a number of times I would let them in with my key because the locks would not work. I could not say how many were locked in during the time I was there. It was a frequent occurrence. Those locks were finally taken off by the engineer of the hotel."

[Tr. pp. 470-472]:

"My name is James White. I live at 1578 East 23rd street, Los Angeles. I have charge of the wash room concessions at the Alexandria Hotel and a number of other places. I have worked for the Pacific Coin Lock Company in San Francisco. I had charge of the wash rooms on the concessions at the World's Fair. I was the head man there. I was at the Alexandria Hotel in 1919 and I am still there. I recall that sometime in the summer of 1919, there were coin locks installed by the Pacific Coin Lock Company at the Alexandria Hotel. We were constantly having trouble with the locks installed by the Pacific Coin

Lock Company at the Alexandria Hotel. People would come in and put nickels in and they would get jammed and they could not get in them lots of times; they could not get in the toilet because the nickel did not work; and lots of times when they did get in they could not get out easily. There were lots of times we had to help them get out, after they would get in there they could not unlock it from the inside so they could get out. And we would hand them a chair over inside of the toilet, so they could stand up on it, and set a chair on the outside so they could crawl over the door and get out that way. We had lots of trouble that way. It was quite a common thing for that to happen. I wouldn't say it happened every day, but sometimes it would happen two or three times in a day. We had difficulties about the nickels jamming, so they couldn't get in. That was very frequent, where the nickels would jam; that would happen sometimes 20 times a day. I reported to the Pacific Coin Lock Company about the condition of those locks. I used to keep a telephone where I could always go and call them up and tell them about the trouble we were having. They would send men down, and sometimes I would have to telephone them to come and get people out. I think we would always have them out, though, before they could get there, by using the chair system.

Q. By Mr. Newby: Now, do you know about the removal of those locks in February, 1922, from the Alexandria Hotel? A. Yes, the management got so disgusted that they took the locks out, had them taken off. They took those locks out, and later on put some more locks on, a different kind of lock.

(Witness continuing): Mr. Hammond, the manager of the hotel, ordered them out. That was because of the trouble we had had with the locks and numer-

ous complaints that would go up to the office about the locks. Customers would come in and get so angry they would go upstairs and report it, and they were continually reporting those things, and Mr. Hammond got disgusted and had the locks taken out."

[Tr. pp. 473-475]:

"My name is R. F. Shinn. I live at Burlingame, California. I am manager at San Francisco for the Pacific Coin Lock Company. I have been with the Pacific Coin Lock Company since February, 1922. I was first located in Seattle. I arrived in San Francisco Thanksgiving Day of 1922, and took over the business on the first of December. In Seattle I was everything in connection with the business, collector, and installed the locks and removed them. I am familiar with the locks installed by the Pacific Coin Lock Company at Seattle.

Q. In a general way, what particular places were locks installed? A. We had about five hotels; we had the business of the city; we had two stage line depots; we had one lock in the railroad depot; and a few scattering locations.

(Witness continuing): There were no other employes of the defendant in Seattle besides myself. We had difficulties with the operation of the locks installed by the defendant corporation in Seattle. The lock was mechanically defective, the old 'A' lock, and later the 'C' lock. The bolt, to be specific, was about half cut in two, and on a heavy door, where the door was slammed, it would very often crimp that bolt a little, and the nickel would jam and lock men in the toilet. That happened very frequently. That was the worst trouble, that bolt locking persons in the toilet; but the parts were not interchangeable. I would go out to take a lock and find a bolt that did not fit, and have

to go back and maybe have to take a half dozen over there. The latches were not interchangeable. The same latch bolt wouldn't interchange with the one that was in the lock.

Q. By Mr. Newby: What other difficulties did you have besides this locking in? A. Well, one trouble was they didn't have any protection to the keeper, and they would take and open it up with knives and nails, etc., and very often jam that bolt with a rough nail or file, and then she would stick.

(Witness continuing): All locks, I think, nowadays have them, all protected from such depredations as that. The keeper has protection, top and bottom, thoroughly encases the bolt, so it is difficult to get to the bolt, although some of them can still be operated with handkerchiefs and things of that kind.

Q. These difficulties that you had with the locks in Seattle, did any complaints come to you from users of the locks? A. Constantly. The Butler Hotel being the worst.

(Witness continuing): The trouble got so persistent that they threatened to take them off. The trouble was with these mechanical defects in the locks; particularly with this bolt jamming and locking people in. I went over there very often—in fact, one time I remember going over there and helping people out of the toilets. That is the hotel (the Butler) that Cohen used to run.

Q. By Mr. Newby: Did you have to help them over the top? A. Yes, in this case, he wouldn't crawl under. The boys generally tried to get them to crawl under, and sometimes they wouldn't on a very dirty tile floor.

(Witness continuing): When I went down to San Francisco my duties there were the same as at Seattle.

We had some business in Santa Cruz, and some in Sacramento. I supervised those. They had the same locks of the defendant. They used both 'A' and 'C' locks. We had the same experience generally in the locations in San Francisco as we did in Seattle, although I had gained some experience in the lock business and sometimes was able to devise methods to overcome that, where I had not in Seattle. The Fearless Bar on Market street, the Ensign Cafe, and the Waldorf on Market street, across from the Palace, were three of the very hard locations where we had constant trouble. At the Fearless Bar, it was this same latch bolt jamming, and either locking them in, or a man would get his nickel half way in and could not get in and would put another one in on top of it, and then in one or two cases we had to break the case to get it off to fix it.

Q. By Mr. Newby: Do you know of that being done? A. I have broken it."

Mr. D. L. Cosby, who was formerly with the appellant company, but who is now an employee of the appellee company, takes the stand and states that as long as he was with the appellant company they got all the locks they wanted, that the locks always worked well; that they never had to work on them much, but when confronted with letters he wrote concerning the locks he fails to remember what caused him to write them.

The following is typical of Mr. Cosby's testimony [Tr. pp. 602-603]:

"Q. By Mr. Newby: Now, as I understand you, Mr. Cosby, you testified in chief that you didn't know of any delay that had been occasioned by the failure of the plaintiff to furnish locks when ordered. Did

you? A. If my memory serves me rightly, I testified to the unreasonable amount of delays.

(Witness continuing): By unreasonable amount of delays I mean unreasonable length of time.

Q. And you do not now recall that there was ever while you were with the defendant corporation any unreasonable length of time in filling orders for the defendant. Is that what you mean? A. I do not remember.

Q. I call your attention to a letter dated December 10, 1919, purporting to have been addressed to Mr. G. W. Bannister, and ask you if you recall writing that letter to Mr. Bannister. Do you? A. Yes, sir.

Q. I call your attention to this language in the letter just referred to: 'In regard to your proposed trip through Sacramento, Stockton and Santa Cruz, will advise that at this time we will be unable to supply you with locks and equipment for making installations, as we are unable to get same from factory. However, we may arrange for you to take this trip some time in the near future, but are in doubt whether it would justify us in having you make same.' Now does that refresh your memory at all as to any delay? A. Some, yes.

(Witness continuing): I recall that there were times when we were unable to get locks from the factory.

Q. Don't you know there were times when that inability covered a period of as much as eight months from the time an order was put in before it was filled? A. I don't believe it ever did cover that length of time.

Mr. Newby: We ask that this be filed as defendant's exhibit.

The Court: It may be received and filed."

[Tr. pp. 617-621]:

"Q. I show you a document purporting to be a report, 'May 26, 1920, Report on Locks,' and ask you if that is in your handwriting? A. It is.

Q. And I call your attention to this item here, January 18, 1920, will you read that? A. (Reading): 'Lock at Alexandria Hotel, nickel wedged locking user in. Had to take door off to get user out.'

(Witness continuing): I don't remember where I got the information upon which I based that statement.

Q. Now I call your attention to this entry, May 28, 1920, will you read that? A. (Reading): 'May 28, 1920, changed two locks at Dennis Dance Hall, which were installed May 5, 1920. Continually out of order. Nickel control too wide, causing two nickels to pass each other and wedge.'

Q. Where did you get that information? A. I don't know.

Q. I will ask you to read the one of February 7, 1921, with reference to the Alexandria Hotel. A. (Reading): 'New locks at the Alexandria out of order. Nickel wedged. Fixed same before leaving place. One of same locks was put out of order for second (time) in one day.' I don't know whether it is second time or just what it is meant for.

Q. I will ask you to read the item of February 15, 1921, with reference to the Alexandria. A. (Reading): 'New locks at Alexandria changed. Continually out of order. Replaced by 3306.'

Q. I will ask you to read the one at the bottom of the page. A. (Reading): 'March 1, 1921. Man locked in at Alexandria. New lock. Had to stay in booth until I went in (D. L. C.) over and let him out.

Q. Well, that was a personal experience, wasn't it? A. Perhaps it was.

Q. You used the personal pronoun 'I'? A. I did.

(Witness continuing): It don't refresh my memory. I do not have any doubt about the truth of this entry. I imagine that was a condition or I wouldn't have wrote it if it wasn't the truth. In both of these pages they are in my handwriting. To the best of my knowledge it represents the facts as stated.

Mr. Newby: We ask that that be filed as an exhibit.

'Defendant's Exhibit No. A-31.

Report on Locks.

May 26, 1920.

May 26/20. Worked entire morning getting locks in shape for Barbara Worth Hotel at El Centro, which were supposed to be machinically perfect, when received by us from the Coin Controlling Lock Co.

May 28/20. Changed two locks at Venice Dance Hall which were installed May 5/20. Continually out of order. Nickel control too wide causing two nickels to pass each other and wedge.

Sept. 11/20. Lock #C3133 inst. 9/17/20 cash door in bottom out of order, nickels passed each other and wedged.

Lock #3129 inst. 9/7/20 one of the latest models, out of order, nickels pass each other & wedged.

Sept. 29/20. A3135 one of the latest style continually out of order. Had to replace same with old style lock #A2157.

Jan. 18/20. New lock at Alexander Hotel nickel wedged locking user in. Had to take door off to get user out.

Jan. 20/20. New lock at Union Stage user got locked in.

Jan. 26. 2 new locks at Alexander out of order nickels wedged.

Feb. 2/21. New lock at Alexander out of order nickels wedged.

Feb. 7/21. 2 new locks at Alexander out of order nickels wedged. Fixed same before leaving place—one of same locks was put out of order for second in one day.

Feb. 9/21. New lock at Alexander out of order 2 nickels wedged.

Feb. 14/21. New lock at Alexander out of order.

Feb. 15/21. New lock at Alexander changed continually out of order replaced by 3306.

Feb. 18/21. New lock #3419 inst. at P. E. L. B. robbed either Sat. or Sun.

" " " New lock at L. B. Aud out of order. Nickel would not go in control.

Mar. 1/21. Man locked in at Alexander. New lock. Had to stay in booth until I went (D L C) over and let him out.

Mar. 1/21. New lock at V. C. Sta. Installed 2/2/21. Out of order. Buffalo nickel caught in coin control.

(Endorsed): No. 1319-B. Coin Lock vs. Pacific Lock. Deft. Exhibit No. A-31. Filed 10/24, 1927. R. S. Zimmerman, Clerk. By Francis E. Cross, Deputy Clerk.

10/23 C3131—Ladies Dance Hall Venice two nickels passed each other & wedged. Coin latch squeezed together.

On or about Oct. 3/20 woman locked in booth, had to crawl under door at Venice comfort station.

On or about Aug. 10/20 marble broken at Rosslyn Hotel on account patron being locked in booth & had to crawl over top of booth.

10/29/20. New locks at Jack Rabbit Coaster out of order nickel pass each other wedged.

11/1/20. Union wire nickels wedged.

11/1/20. Coin latch broken into (very thin) Ladies c 3131—Venice Dance Hall.

11/30/20. Out of order Union stage (nickels wedged).

(On reverse side, blank lease Pacific Coin Lock Company.)

(Endorsed): No. 1319-B. Coin Lock vs. Pacific Lock. Deft. Exhibit No. A-31. Filed 10/24, 1927. R. S. Zimmerman, Clerk; by Francis E. Cross, Deputy Clerk.'

Mr. Newby: We ask that that be filed as an exhibit."

We do not suggest that Mr. Cosby is lying on the witness stand but it is apparent from the record that he has a very elusive memory.

The testimony of H. J. Cosby is also illuminative of the deplorable way in which the appellee performed its contract.

Mr. H. J. Cosby was in Texas sometime in March, 1920, for the purpose of attending to the locks of the appellant and also for the purpose of getting new business. He was sent to Texas in response to the following telegram [Tr. p. 566]:

"Houston Tex March 13, 1920

Pacific Coin Lock and Co.,
910 Van Nuys Bldg., Los Angeles, Calif.

Your coin locks in the Hotel in awful condition causing us to have attendant constantly on duty to take care of them stop guests complaining bitterly because of poor service stop your representative Lee in hospital due to accident however he would do the locks no good as they are completely worn out stop we cannot longer permit delay in having new locks installed and ask that you wire us what immediate action you can take to remedy situation."

Rice Hotel."

On cross-examination Mr. Cosby stated that he had no complaints while in Texas and that he had no trouble with the locks. However, he admits writing a letter dated March 23, 1920, in which he states [Tr. p. 562]:

"Houston, Texas, 3/23/1920

Pacific Coin Lock Co.,
Los Angeles, Cal.

Gentlemen:

No doubt you received my wire regarding condition of locks received from Indianapolis. I just finished writing Malsbary a nine page letter, also sent them night letter.

Eleven locks arrived today, but sent eight of them back. *The registers would not check at all.* Some in using pass key the latch would not go back far enough to pass keeper, especially if set up close. They had the register screwed on with one screw. Could very easily move same out of place. The holes for screws in back case were to small some not drilled out at all and hole so near the register unable to put screw in. Some of the locks worked free and easy while others

stiff and would bind. Some worked very hard in opening with pass key.

The parts are not standard tried to change some cases and knobs but was out of luck. One of the lugs on the inside spindle was out about so much it broke off. This was used in opening door with pass key. *The bushing for pass key was put in with one screw.* No rosettes at all. Several little defects and believe me I mentioned them in writing Malsbary. *No use putting on these new locks until they are right, but I begin to think they never will get them right* and about the only lock on the market that is right is the Pawtucket lock and its to bad we are not using it. They cut the opening where the cash door fits which made it much easier to get the nickels out, but some of the doors did not fit up tight as they should.

The locks did not get here until about noon today *and I had to go over all of them and when I got through packing, etc., the day was gone.* I certainly was hot under the collar. Came very near wiring Indianapolis office to pay my expense there and I would come in and show them the many defects and how to overcome same.

I will go over the best locks that I took off the Rice and fix the ones at the Bristol and other locations. Will make them answer until the new lock is fixed right. They seem pretty well satisfied here at the Rice so they will be O. K. for a week or so or until we are able to get other locks.

I wrote Malsbary that we must have these locks right as soon as possible as it cost a bunch of money around hotels now days and besides at rate they started out I would be all summer making this trip. Had to have the painting done here at the Rice at night. Have a man working tonight, have to pay

him double time, but at that cheaper than contract. One man wanted $60. to paint and enamel the seven doors. I am going to install two or the latest locks at the Bender tomorrow and see how they work out. Will also go over the other locations, get the painting finished and if the other locks have not arrived will go on to Dallas and finish up here on my way back. I have hustled around so much today my head's in a whirl and I wan't to go down stairs to keep the painter going as he is apt to fall asleep too the tune of $1.75 per hour.

Guess I have explained particulars and if anything special tomorrow will write you again.

With best wishes, I am

Yours truly, H. J. Cosby."

To the same effect is a letter of March 25, 1920. [Tr. p. 568]:

"Rice Hotel
Houston, Texas,
Friday Eve. 3/25/1920

Pacific Coin Lock Co.,
910 Van Nuys Bldg.,
Los Angeles, Calif.

Gentlemen:

I am enclosing letter from Crosby House of Beaumont, Texas. I was informed they inquired about our locks here at the Rice. I wrote them and their letter explains for itself. No doubt the Pawtucket people or the American Sanitary Lock Co., are working all through the South. Mr. Lee was with me all day seems to be getting along in good shape. Finished up the Bender, Brazos and Macatea. Went over all the locks and had to make a lot of changes and repairs.

Received the balance of the locks from Indianapolis yesterday but have sent them all back excepting three. Installed two additional out at the Bender and have one for sample. But will have to return them later on as the registers don't check. I was anxious to get the Bender locks on while I was having the other ones painted as could do them all at once. Mr. Lee can change them later on if necessary. He claims he has learned a lot about the locks since being with us, of course this is to be found out later on as things were in pretty bad shape and had a lot of work getting them in good shape." (Italics ours.)

[Tr. p. 331, line 19, to p. 332, line 6]:

"Want to call on the Union Station again tomorrow and a few other places. Wont be able to see Mr. Milby of the Milby Hotel until next week. *Am anxious to hear from Malsbary to see what excuse they have to offer. They had better put Bill on a pension and get a real locksmith.*

Up to the present time have not heard from Mr. Baner of Lubbock, Texas, regarding locks. I may be able to tell tomorrow whether I will stay here a few days longer or go on to Dallas and finish on my way back.

Send Mr. Lee the three seats I ordered as soon as possible. Two for Bender and one for Filbets Hotel.

Will write you a few lines again tomorrow.

Yours truly,

H. J. Cosby."

(Italics ours.)

There are still other letters by this gentleman who complains of the numerous defects in the locks and the failure of the appellee company to ship as ordered. For instance:

[Tr. p. 571]:

"Q. I call your attention to this language: 'It was necessary to go over all of them before they were OK., so many little defects that are over-looked in shipping from the factory.' What were those defects that were over-looked?"

"Q. In this letter you say, 'I would like to install new locks at this location, but am not sure how soon can get them. I ordered new locks for all these locations but it don't look as though we will be able to get them installed so long as the strike is on. Malsbury wrote me they would do their best in furnishing me locks but were unable to get enough castings. If they keep on exchanging these locks and different parts there will be quite a mixup.' What did you mean by that?"

[Tr. p. 575]:

"El Paso, Texas
5-5-1920.

Pacific Coin Lock Co.,
Los Angeles, Calif.

Gentlemen:—

I arrived here this afternoon at 4:30. Had a talk with Mr. Pinto. The locks need changing and they are being used a great deal by not depositing a nickel. All the pass keys brushings are worn on, in other words the little teeth are all cut out so you can very easily open with a knife or most anything. Up to the present time there is only one A lock here. Suppose I will have to wait for the balance. I wired the number of locks to be sent here about three weeks ago but as usual *the Indianapolis office don't seem to be able to get locks out as they should.*"

[Tr. p. 576]:

> "If the locks arrive tomorrow will be able to finish here Friday, but no doubt will be hung up as usual, as they generally ship two at a time and they come day after day, never send the whole bunch at once. The weather is much cooler here. Will advise you later if lock don't arrive."

[Tr. p. 577]:

> "Q. You say,—'I got this letter from Mr. Moore, the general cashier here at the Oriental, the party I arranged to look after our locks here at the hotel. Wish you would forward this letter from the American Lock Company to Indianapolis office as you can see they are getting some fine business over the country and something must be done to stir up the Indianapolis office. They try to make themselves believe they are the leading coin lock company. But I am willing to bet they are about third or fourth in the coin lock game."

And on page 577 of the transcript the witness finally admits that the locks furnished by plaintiff might have been quite defective at that time.

This witness, who, on the stand so glibly praised the conduct of the appellee in this matter and extolled the appellee's locks, finally became so disgusted with the whole situation that he writes this letter, in which he refers to the plaintiff's locks as *junk locks.*

[Tr. p. 580]:

"Houston, Texas,
3-2-1920
Sunday, 3:30 P. M.

Pacific Coin Lock Co.,
910 Van Nuys Bldg.,
Los Angeles, Calif.

Gentlemen:—

This morning I received a letter from Malsbury saying they were sending me c/o Rice Hotel some new locks via Parcel Post. Just as soon as they arrive will change the locks here at the Rice Hotel again, as I was down in the toilet room for over an hour this morning and two or three of the locks just installed would let a smooth nickel get through if the 'Rube' pushed and turned the knob the wrong way. Some of these farmers in this City grab a hold of the locks as if they were grabbing a bull by the tail or some other rough spot. Too my surprise I find the Rice have Pawtucket locks installed on the second floor. The gents have two toilets both locked and there is one or two on the ladies side. No use talking if we hold the business down stairs after our contract runs out we will certainly be luckly as I have always said this Pawtucket lock has anything beat on the market. Has our lock beat in so many ways. First its much larger and holds about twice as many nickels, they are very easy to get the nickels out. No chance of nickels falling through, a much stronger lock, one that will stand rough use. I tried one out this morning, put in a rather smooth nickel, I pushed, pulled, and turned the handle several times but still you could open the door. I also find the Hotel Cotton here has one of the Peerless locks installed. Will get the dope on it tomorrow.

I wrote Malsbury this morning telling him about the Pawtucket locks here and suggested again that Van Cleave get busy and try to buy them out. I also have a suggestion to make to you. If Van Cleave won't try to buy them out or unable to put out a lock as good *I would get busy and try to make arrangements with the Pawtucket Co., to use their locks on the Pacific Coast and Texas.* Would be better for some one to go there and talk matters over, would do this before they get much of a start here in Texas and no doubt it won't be long before they will be in California and other western states.

The new lock that the Coin Lock people are putting out is even smaller or at least don't think it holds as many nickels. The auditor mentioned about the lock being small and in busy days necessary for them to collect twice a day. You can figure yourself by having a larger lock it saves a lot of work. *Now there is no use talking its up to some one to get busy and save our business and if Van Cleave continues to sit tight I wouldn't waste any more time but would try and make some arrangements to use the Pawtucket lock. I know that I am not in this lock game for my health and I figure there isn't much of a future for me as long as we continue using junk locks.* You know I had a chance to connect with the Pawtucket people as well as the Peerless and no doubt would of been a good future but for reasons, practically no other than on account of being connected with the Coin Controlling Lock Co., for several years and besides being friends of all connected with this company, I decided to continue with their lock. *Now we are going to have a pretty rough road to travel to overcome all of competition and unless we all get busy at once we will find ourselves going backward, instead of forward.* I was wondering if Delbert placed an order for the larger sizes. We

will be apt to need a good many before I finish this trip.

You can continue writing me c/o the Rice as no doubt will be here for some time as I intend having all the locations painted and put in good shape before I leave.

Yours truly,
H. J. Cosby."

(Italics ours.)

Mr. Miller testified that there were long delays in shipments, that the appellant company could not get enough locks to supply its needs. The record is replete with letters and telegrams from the Pacific Coin Lock Co., to the appellee demanding and requesting more locks and complaining of the condition of the locks which it did receive.

The following letter is typical.

[Tr. p. 261]:

"Mr. Newby: We offer letter dated June 9, 1920, reading as follows:

'Coin Controlling Lock Company,
617 Traction Building,
Indianapolis, Indiana.

Gentlemen:

It has always been the purpose of the Pacific Coin Lock Company to treat Coin Controlling Lock Company with absolute loyalty and frankness. No effort and no money has been spared by us to promote the interest of the coin lock business in our territory. We have met with success, *which has been limited only by the great troubles we have experienced on account of the mechanically imperfect locks that you have sent us.*

Time and again we have called to your attention the fact that the locks were not being properly delivered to us and that our efforts to keep them in working order were enormously expensive. In spite of that fact the locks are continuing to deteriorate instead of getting better.

At the same time our orders have not been filled and we have lost a great amount of business on that account. There was an order put in about two months ago for San Francisco territory calling for 25 locks, which has never been filled, although we have asked again and again for the locks. This has discouraged our San Francisco man to such an extent that he has threatened to resign. We sent you a telegram of explanation in this matter on May 26th, to which we have received no reply and no locks.

In the meantime our competitors are here cutting rates and offering our customers, who have written contracts with us to make good anything they suffer in damages by virtue of breaking the contract. The Pacific Electric gave me this information confidentially and at the same time told me that the Pawtucket people had a much better lock than we had. They were inclined to take it up when our contract with them expires.

This letter is sent you merely for the purpose of saying without heat nor not in the nature of a threat that we are going to do whatever seems wisest to protect the business that we have built up. We cannot hold our present business with the locks that you are furnishing nor with those that you failed to furnish.

Very truly yours,

PACIFIC COIN LOCK CO.,
By C. E. Miller,
President."

(Italics ours.)

The Court: That may be received and filed.

(Defendant's Exhibit A-4.)

The letters on this subject were all filed as Defendant's Exhibit A-5 and A-6.

The appellee's usual course of conduct is illustrated by the following series of letters and telegrams:

On July 12th, 1920, the following telegram was sent:

"Los Angeles, Cal.
July 12th, 1920.

Coin Controlling Lock Co.,
617 Traction Bldg.,
Indianapolis, Indiana.

How about that surprise mentioned your wire June twenty sixth stop If you do not intend shipping us any more locks please say so City of Seattle insists city comfort stations be equipped immediately stop *Do you realize your delays in not sending some kind of locks has cost us more money this year than we will make* stop *If you would only partially live up to your promises we might feel different but you give us the same old story from time to time* stop Are you going to keep promising or are you going to give us real service Wire answer.

Pacific Coin Lock Co.

Chge. P. C. L. Co.,
910 Van Nuys Bldg:, City."

(Italics ours.)

[Tr. p. 268]:

July 20th, 1920, another telegram as follows:

"Day Letter

WESTERN UNION TELEGRAM

Los Angeles, Cal. July 20th, 1920

Coin Controlling Lock Co.,
617 Traction Bldg.,
Indianapolis, Indiana.

We have just received executed contracts from City of Seattle calling for fourteen C locks Eleven A locks stop Installation must be ready for use by August first If not made by that date city has right to cancel contract stop It has required all the pull we have to get this contract and city officials do not look with favor upon it stop If we lose this contract account no locks you must assume responsibility Be governed accordingly wire answer.

PACIFIC COIN LOCK CO.

Chge. Pacific Coin Lock Co."

[Tr. p. 269]:

And on July 22nd, 1920, the following:

"WESTERN UNION TELEGRAM

Los Angeles, Cal., July 22nd, 1920.

Coin Controlling Lock Co.,
617 Traction Bldg.,
Indianapolis, Indiana.

Are you going to comply with ours of twentieth wire answer.

PACIFIC COIN LOCK CO.

Collect"

[Tr. p. 270]:

On August 10th, 1920, the following:

"Day Letter

WESTERN UNION TELEGRAM

Los Angeles, Cal. Aug. 10, 1920.

Coin Controlling Lock Co.,
617 Traction Bldg.,
Indianapolis, Indiana.

Refer to your telegram of July twenty ninth Advise the delay.

PACIFIC COIN LOCK CO.

Chge. P. C. L. Co.
910 Van Nuys Bldg."

On August 12th, 1920, the following [Tr. p. 270]:

"Day Letter

WESTERN UNION TELEGRAM

Los Angeles, Cal. August 12th, 1920.

Coin Controlling Lock Co.,
617 Traction Bldg.,
Indianapolis, Indiana.

In answer your wire tenth we cannot satisfy our patrons any longer stop Seattle is about to kick out *You were notified in plenty of time about this contract and you were urged to take care of it* stop *your promises amount to nothing* stop *Pacific Electric are phoning nearly every day locks are out of order* stop *Do you think they will put up with this much longer* stop *Please tell us what your game is.*

PACIFIC COIN LOCK CO.

Collect." (Italics ours.)

On September 1st, 1920, the following [Tr. p. 271]:

"Night letter

WESTERN UNION TELEGRAM

Los Angeles, Cal. Sept. 1st, 1920.

Coin Controlling Lock Co.,
617 Traction Bldg.,
Indianapolis, Indiana.

Believe last shipment of locks impossible to us with any degree of satisfaction. Believe they will cost more to keep up than receipts justify and because of much complaint. Hold further shipment until further advised.

PACIFIC COIN LOCK CO.
By

Chge. P. C. L. Co.,
810 Van Nuys Bldg., City."

And on September 2, 1920, the defendant in desperation sent the following letter [Tr. p. 271]:

"September 2nd, 1920.

Coin Controlling Lock Co.,
617 Traction Bldg.,
Indianapolis, Indiana.

Gentlemen:—

Twelve of your locks came yesterday and after a hurried examination we sent you a night letter, copy of which is enclosed herewith. This wire was sent because we can't use the locks that you sent us and we deemed it wise not to cause you the trouble and expense of sending any more of like character. After the writer has a conference with Mr. Garrison, today we shall probably ship back all of the locks that you sent.

Our objections to the locks in part are as follows:

(1) The opening at the bottom of the lock for removing the coins affords no protection from thieves, who have taken several hundred dollars from us during the past month. To enter the latest coin box, they do not need any keys. Mr. Cosby pulled out his key ring and had two keys on it, one to his garage and one to his car, both of which opened the coin box of your latest lock. The twelve different combinations of locks confuses the thieves somewhat, but the new method of opening the latest lock will be a cinch for them. Also the removable plate is a poor fit and can be easily jammed with a cold chisel.

(2) The metal post to which the coin plate is fastened holds up the nickels when the coin box is full.

(3) The stop on the keeper will hit the knuckles of the occupant when he opens the door to come out.

(4) Practically all of the objections we had to the jamming of the nickel apply to this lock as they have to all of the other locks in the past two years.

The installation of the lock which you sent us would only increase our troubles and the objections of our customers all of whom have had about all they can bear from poor service of your locks.

The City of Seattle has been waiting installation of 16 locks since the first of July. San Francisco has been waiting the installation of some thirty locks for about a year. There are other installations of which you have been advised, which will bring the total number of locks that we need up close to 100 including those poor ones that need to be replaced with good ones. We have kept a careful list of actual damages suffered by us, which can be proved that will surprise you, all on account of your failure

to provide mechanically perfect locks as ordered.

The fact of the matter is, gentlemen, that every time you put out a new lock you put out a worse one than its predecessor. The lock that you sent us in 1915 after we had spent the necessary work and time with a file, jig saw and emory wheel, the result was the best lock that you have ever sent us. We have some of those locks at work yet and they give us practically no trouble, while all of your latest locks are chuck full of trouble. I want to tell you that you are on the wrong road and you are not going to get any where unless you change your system. Your promise of giving us bronz locks don't encourage us a bit, it is the inside of the lock that we are worried about and a method of keeping thieves from stealing the money. You ought to have a Yale lock that can't be jammed. There are a lot of little defects inside the lock that anybody who is familiar with its use could get on to in a minute. We have given you our ideas a number of times, but they don't seem to appeal to you.

Some time ago we suggested that you give us the right to manufacture these locks here on a royalty basis. I'll lay a wager that we could produce in the city of Los Angeles under our supervision a coin lock that will please our customers and help us to increase our business instead of one that makes us hustle to keep what we have already secured.

There are now and have been for over a year, representatives of the American Coin Lock Company, American Sanitary Lock Company in addition to two or three local locks that are being manufactured here and offered for sale outright. It has been very hard for us to meet this competition with the weapons supplied by you.

We had a contract with the City of Portland to use two locks in their main comfort station over six months ago and just got advice from our manager there that the city had purchased some locks, because we couldn't supply them.

There are any number of coin locks out now that are being offered for sale throughout our territory. *We can beat these fellows out on our reputation for service if we have a decent lock and a good supply of them, otherwise we will lose out.*

Please understand that we have not tried to cover all the objections to the locks, as for instance we neglected to mention the pass keys which can be purchased from any of the dealers in Los Angeles, but we have indicated to you that you are not giving very much in return for the $10.00 per year per lock that we pay you and there is trouble ahead for all of us unless you succeed in producing a mechanically perfect coin lock.

Very truly yours,

PACIFIC COIN LOCK CO.,

By

President."

(Italics ours.)

This produced some results because the plaintiff shipped 18 locks on October 16, 1920, and Mr. Miller writes as follows, on receipt of the telegram:

"Pacific Coin Lock Company,

910 Van Nuys Building,
Phone Broadway 3062
Los Angeles

October 19, 1920

Coin Controlling Lock Co.,
617 Traction Bldg.,
Indianapolis, Ind.
Gentlemen:

We beg to acknowledge receipt of your telegram dated Oct. 16th, as follows:

'Shipped parcel post eighteen locks today two more Sunday.

Coin Controlling Lock Co.'

We will be very glad to get these locks and will use them, if they are in good working order. As you know, we are in very serious condition on account of your failure to supply us with locks, and on account of the imperfect working of those locks that you have supplied. We hope these locks will help us out somewhat.

At the same time, we want it distinctly understood that we do not forget and forgive all of your past failures because we accept these twenty locks. We have been long suffering and very patient with you, and we are still hopeful that things will come out all right, but at the same time, we must always keep ourselves in position to protect our own business.

Very truly yours,

PACIFIC COIN LOCK COMPANY."

(Italics ours.) [Tr. p. 274.]

The record shows that the defendant sent letter after letter and telegram after telegram to the plaintiff company requesting shipments pointing out defects and telling the plaintiff that it was losing locations and business because of plaintiff's lack of cooperation and failure to properly fill the orders as needed.

Mr. Van Cleave, as president, did not even see fit to accord the defendant the courtesy of answering its frantic appeals for locks.

Mr. Miller also testified [Tr. p. 261] that while the sample locks were well prepared and properly machined the locks sent for use would be unpolished, not machined and rough finished.

On page 330 of the transcript Mr. Miller is asked to state the difficulties experienced by the defendant company in operating the locks shipped to it by the plaintiff. This testimony is quite voluminous and we refer the court's attention to it but call attention to this particular portion found at page 336 of the transcript:

> "Q. By Mr. Newby: Did you lose any locations in Texas? If so, when, where and why? A. We lost the Rice Hotel. When their contract expired they ordered the locks taken off, or they would take them off themselves, because they claimed the locks were continually out of order and would not work properly. We lost the Gunter Hotel in Texas for the same reason We lost the city comfort stations in the city of Dallas for the same reason. We lost the Metropolitan Hotel in Ft. Worth, I think it was, for the same reason. That is all I can recall by reason of improperly working locks. We lost a lot of them because we didn't have locks to put on."

And page 337 of the transcript is as follows:

"Q. By Mr. Newby: Now, Mr. Miller, you stated that certain locations were secured in the city of Seattle. Were there any locations secured from the city? You mentioned an ordinance was passed. A. I recall that very well, because I secured that myself. The contract with the city of Seattle was an ordinance passed by the City Council and signed on the 14th day of July, 1920. We were unable to secure locks, although we made repeated requests by wires and letters, and every week or two for a year, and were finally advised by our attorneys in Seattle that the city had put on some locks that they had secured elsewhere. But we again, through our attorneys in Seattle, were enabled to get the contract renewed, and finally we got the locks and put them on the 7th day of July, 1921, more than a year after we had requested them.

Q. I will ask you to state to the court whether or not in your opinion you could have secured additional locations prior to the termination of this contract if you could have secured locks to put on the locations? A. Yes, indeed; there were several very attractive avenues for new business which I purposely refrained from trying to get, because we had neither a supply of locks nor locks that would work.

Q. Can you tell the court any particular locations or case that came in that category you have just mentioned, that you had it arranged, but could not get locks of the kind or quality desired? A. Southern Pacific Railroad."

[Tr. pp. 338-339]:

"Q. By Mr. Newby: Do you recall any other locations? A. At a considerably earlier period,

mentioned in these letters there, I had an agreement with the city of Los Angeles to lock the public comfort stations of the city of Los Angeles. I had an agreement with the park commission, under whose jurisdiction and management the public comfort stations at Los Angeles comes—I met with them and they agreed to allow us to lock certain toilets in the city of Los Angeles; and we were allowed to try out two of the locks in Westlake Park, and they worked so badly that the city told me, the park commission told me, they could not tolerate a lock of that character, and if I should come at a later date with a better lock they would talk to me again about locking some of the toilets, but not with that lock."

On April 23, 1923, the appellant sent the following telegram to the appellee [Tr. p. 340]:

"Los Angeles, Calif. Apr. 23, 1923.

C. N. Van Cleave
617 Traction Bldg.,
Indianapolis, Ind.

Your letter seventeenth Stop I have purchased Garrison interest in Coin Lock Company and sold one third interest to Lee Hervey suggest you postpone trip here about one month until after our attorney visits Indianapolis Stop My program will compel me to be away most of the month anyway Stop Under any circumstances however will be glad to see you personally and help you have a good time in California.

CLINTON E. MILLER,
1233P"

In explaining the reason for sending this telegram Mr. Miller testified [Tr. p. 340]:

> "I don't know just what you have in mind, but I will state we had arrived about the first of the year 1923 to the conclusion that we couldn't hope for a good lock from the Coin Controlling Lock Company, nor for a supply of locks, as needed. We had sent a series of telegrams and letters, to many of which we received no answer, in the latter part of 1922. I think in the latter part of 1922 I sent a telegram in which I told them we had accumulated orders for locks, in which I told them we were in need, as I recall, of 200 or more properly working locks; that we had lost business in all parts of our territory because we had received no locks at all, and those we did receive were very poor and would not work properly; and I insisted upon Mr. Van Cleave coming to California, and offered to pay half his expenses if he would come out to California and discuss the situation; that I would come back there except for pressing matters I could not leave. He stated he was coming, but didn't come. His locks didn't come, and we were without properly working locks and were away behind in our orders. In fact, there never was a time after 1919 that we ever were in any other condition than from 10 to 200 locks in arrears for locations on which we had contracts. So on the first day of January—
>
> Mr. Shoonover: May we have that identified as to what exhibit it was? The telegram he is talking about.
>
> Q. By Mr. Newby: Can you state when that telegram was sent? A. It is in that exhibit A-5.
>
> Q. Go ahead. A. The letters and telegrams there will all speak for themselves as to those matters. I can't recall the contents and dates of all of

them; but I know the situation approached that where I began to try to find a place where I could get a lock that would work properly and a supply of locks. I wired the General Service Company at Baltimore, whose lock I considered to be one of the best in the United States, and offered to pay Mr. Hervey's expenses, who was president and controlling owner of the company,—offered to pay his expenses if he would come to Los Angeles and discuss the matter of obtaining locks for our locations. Before that time, Mr. Garrison and I had decided that the lock situation had arrived where there was not enough for both of us to give so much time to it; and I made a give and take proposition and Mr. Garrison decided to sell his interest to me, which I purchased. And upon Mr. Hervey's arrival here, we negotiated, and I made an arrangement with him to supply us with locks,—made a tentative contract with him to supply us with properly working locks. I thereupon sent a telegram. I had received a few sample locks, about the 25th sample I had received.

Q. That is from the plaintiff? A. Yes, and upon receipt of that notice that they were going to send us some locks, I wired them not to send locks, that I had made arrangements for other locks and sold a one-third interest to Mr. Hervey."

On this record the court finds that the appellant condoned and encouraged the breaches of the appellee.

At the trial the appellee contended that the acceptance of the locks and their use by the appellant constituted a waiver of the defects.

The rule contended for is not only an inaccurate statement of the law, but is not applicable to the facts of the instant case.

The proposition is well stated in 6 Ruling Case Law, 992:

> "Not infrequently it happens that the subject-matter of the contract is used or retained by the promisee because, under the exigencies of the case, he has no alternative. Notwithstanding the fact that he knows that the subject-matter is not such as has been contracted for, the use of retention thereof under the pressure of necessity, though it requires him to make compensation to the extent of the benefit actually received, is not such an acceptance as amounts to a waiver of the damages sustained because of the imperfect performance."

If the appellant had returned the defective locks as fast as received it would never have been able to install a single lock as the record shows that none of the locks ever received by it were in shape to be installed or worked satisfactorily after installation except for short periods of time. And then only under constant care and attention.

But there is still another factor to be considered. The appellee kept promising to make the locks good and led the appellant to continue their use in the hope and expectation of at last receiving a good workable lock.

On July 30th, 1919, Mr. Van Cleave sent the following telegram:

[Tr. p. 224]:

> "Mr. Newby: We offer original telegram from Mr. Van Cleave to Mr. Miller, dated July 30, 1919, and reads as follows:
>
> 'Hearty congratulations old man I am for you Will send locks as fast as possible You have the right system of the comfort station business You have

the personal pull to beat any competitor on the coast We will do our part Writing you fully'

"Q. By Mr. Newby: Do you know anything about the circumstances of this telegram? A. That telegram, as I recall the matter, was in response to our information to them that we had secured certain valuable contracts and were negotiating for the contracts for all the city comfort stations in the city of Los Angeles."

On January 14, 1920, Mr. Van Cleave writes to the defendant as follows:

[Tr. p. 243]:

DEFENDANT'S EXHIBIT T.

"Home of the Coin Lock
Coin Controlling Lock Co.
Traction Building, Indianapolis, Inc., U. S. A.
Chicago Detroit Milwaukee San Francisco Los Angeles Atlanta New York Boston Portland Seattle Syracuse Sioux City

January 14, 1920

"The Pacific Coin Lock Co.,
#910 Van Nuys Building,
Los Angeles, California.

Attention Mr. C. E. Miller
Mr. C. C. Garrison

"My Dear Fellows:—

"I am going to start a surprise on the road to you about the day after tomorrow in the form of a new lock and 'believe me it is going to be some lock this time, and take it from me' within thirty days from now and I believe it will be less time than that we are going to be able to give you locks to your heart's content. I know that this will be a pleasant surprise and God knows a great relief to us.

"If we haven't got a lock now that is absolutely foolproof which will work as perfectly as the hour

hand on your clock, I am going to quit trying to think one up, so make your plans to get ready to take care of the business. I am going to endeavor to get one on the road to you by the day after tomorrow. Then I want you to pick it to pieces; tell me all the faults you can find because it is out of these criticisms or suggestions on the part of gentlemen like yourselves who have the actual experience that helps us to overcome the defects. I have never seen one yet up to the present time but that has plenty of them when it comes to being knocked around by the public, but I tell you I believe we have it.

"Trusting that everything is going well with both of you, and with many good wishes for the New Year, I am,

Very truly yours,

CNV/MEW C. M. Van Cleave."

And then again on March 3, 1920, Mr. Van Cleave in reply writes:

[Tr. p. 249]:

Defendant's Exhibit W.

"Home of the Coin Lock
Coin Controlling Lock Co.
Traction Building, Indianapolis, Ind., U. S. A.

Chicago Detroit Milwaukee San Francisco Los Angeles Atlanta New York Boston Portland Seattle Syracuse Sioux City

"March 3, 1920.

"Mr. C. E. Miller,
Pacific Coin Lock Co.,
#910 Van Nuys Bldg.,
Los Angeles, Calif.

Dear Mr. Miller:—

"We are in receipt of yours of the 24th and have noted carefully its contents. I want to thank you for

the check of $750.00 which has been placed to your credit.

"My Dear Sir, at this point I want to take up with you the paragraph of your letter in which you ask us to give you a credit for business that you are supposed to have lost. I think you will have to admit that we have always shown the spirit of meeting you half way on almost anything and have already made a number of concessions and you will always find us ready to deal with you in the same manner on future questions that may come up, but this is one that we cannot see our way clear to grant. If you gentlemen think for a minute we have not had our troubles at this end of the line endeavoring to get locks to you, you have another guess coming. We have both had our pleasant and unpleasant experiences which are only characteristic of any line of business and particularly so at this time and under conditions that have existed for the last four years.

"The most fortunate thing that has recently happened in connection with this business is the discovery of the new method of making the lock. It is going to be very simple and easily constructed, thereby enabling us to turn out three to the one turned out before, and we are calling in outside help.

"We realize the importance of getting a stock of locks ahead. 'Take it from me' we are going to get them to you at an early date and plenty of them and with your representative the Independent Lock Company, it is going to be your own fault if you don't put your competitors out of business. In this connection we have employed the best firm of patent lawyers in Indianapolis and they are now getting ready and we hope to within the very near future file suits against our various competitors, for as I have told you before, we are going to control this business

for we feel confident that our patents will protect us and we are going to defend them, but patent litigation is a very expensive undertaking, naturally we wanted to shirk it as long as it is policy to do so but we have now reached the point where we are going to take action.

"If you possibly can we would like very much indeed to have you secure one of the locks of your new competitor and get it to us at the earliest date possible.

"With reference to Utah, we will give you permission to install our locks in Ogden and Salt Lake City but don't construe this to be exclusive for all time to come. We want to be absolutely fair and generous with you but we don't want any misunderstanding or unpleasant arguments like that which came up over Texas.

"I will write you again the last of this week or the first of next week sure and give you something more definite as to the date of generous shipments.

Yours very truly,

Coin Controlling Lock Co.,

By C. N. Van Cleave.'"

A reading of the transcript shows that the appellee was constantly promising better locks and quicker shipments, but invariably failed to conform to the promises. The appellee would ship excellent sample locks properly machined and constructed of hard metal. However when the actual locks arrived them were not machined, made of soft metal and rough casting.

[Tr. p. 441]:

> "Q. I will ask you if it is not a fact that you did not from time to time order locks and specify the newer equipment repeatedly? A. Yes, we would order equipment according to the finished model that was sent.
>
> Q. Didn't you repeatedly specify new equipment, and say they were working better? A. No, it was because the old equipment was working so bad we wanted to try the new ones, and we had models sent us that worked perfectly, because it was machined and hard metal, and when we would get the locks they wouldn't work at all, they were cast and rough and coarse, and impossible."

Where the record shows a state of facts as existed in this case the rules of law applicable are clearly defined. The appellee has attempted to show a waiver of the defects and the breach of warranty because the appellant used the locks. But it has been repeatedly held in California and elsewhere that where such use and retention is under the force of necessity or that the use was encouraged by the vendor for the purpose and under the promise of correcting the same there *is no waiver.*

The authorities cited *supra* and the following authorities support this view:

> Ventura Mfg. Co. v. Warfield, 37 Cal. App. 147;
> Luitweiler etc. Co. v. Ukiah etc. Co., 16 Cal. App. 198.

A somewhat similar rule though broader in scope is stated by the court in Wallace v. Clark & Co. (21 A. L. R. 361, 364), where it is said:

(p. 364) "The authorities are not in accord on the question whether an implied warranty survives acceptance, with knowledge by the purchaser of a breach of the warranty. Aside from New York, the rule generally obtains in most states that an implied warranty, like an express warranty, survives acceptance, even as to known defects, to the extent that the breach may be relied upon as furnishing a basis to recoup or counterclaim damages in an action for the purchase price, or as the basis for an independent action for damages. Firth v. Hollan, 133 Ala. 583."

Benjamin v. Hillard;
Memphis v. Brown, Fed. Cas. Mo. 9,415;
23 How. 518;
16 L. ed. 518.

And in 35 Cyc. 433, the rule is laid down and amply supported by authorities that where the retention and use has been induced by the request or promise of the seller there is no waiver of the warranty.

See also:

35 Cyc. 430.

The complement of the rule is stated in 22 Cal. Juris. 1006, where it is said:

(p. 1006) "In the case of a sale of machinery which requires adjustments, the seller is entitled to a reasonable time in which to demonstrate that the thing can be made to function; and if he has remedied all all defects which the buyer called to his attention, there is no basis for a claim of breach of warranty; but if his efforts, following upon the time of delivery, proved to be unsuccessful, the buyer is entitled to repudiate the transaction; and the circumstance that, at

a subsequent time, the machine was operated by the seller, does not affect the buyer's right of rescission."

Jackson v. Porter Land & Water Co., 151 Cal. 32; 90 Pac. 122;

Boothe v. Squaw Springs Water Co., 142 Cal. 573; 76 Pac. 385;

Ventura Mfg. Etc. Co. v. Warfield, 37 Cal. App. 147; 174 Pac. 382;

Williams v. Bullock Tractor Co., 186 Cal. 32; 198 Pac. 780.

So, where the buyers use the article the retention of it beyond the stipulated time is not a waiver of the breach of warranty when it was for the purpose of giving the seller an opportunity to remedy the defects called to his attention.

Lichtenthaler v. Samson Iron Wks., 32 Cal. App. 220;

30 American & Eng. Ency. of Law, 188;

Fox v. Harvester, etc. Works, 83 Cal. 333.

The general rule in all jurisdictions is that an express warranty survives acceptance and that damages for a breach of an express warranty will lie though the purchaser has received and used the goods. And especially is this true where the use and retention is under the force of necessity or induced by the promises of the seller or his attempts to make the article conform to the warranty. In the latter class of cases the courts have held that the buyer can even rescind the contract though there has been an acceptance.

The only controversy in our system of jurisprudence on this matter is over the question of whether or not the

right of rescission will survive acceptance, use and retention. All agree that the right to damages does survive.

With these broad general principles in mind we can proceed to examine a special rule applicable to the class of cases in which the instant case falls.

Where we have a contract such as the contract in this case where there is to be successive deliveries of patented articles of machinery to conform to a warranty, and such deliveries are neither on time nor in conformity with the warranty and the installments are all inferior, with the exception of a few samples, the buyer or lessee, in addition to his right to sue for the breach of warranty, has the right to terminate the contract, refuse to pay for or accept future installments, and would, under such circumstances, become liable only for the value of the goods retained, and the benefits derived by him in their use.

This proposition is well demonstrated in the case of Bobrick Chem. Co. v. Prest-O-Lite Co., 160 Cal. 209, 215, where the court said:

> "If it is made apparent that the articles to be furnished by the vendor cannot come up to this standard, by reason of some defect in the plan or device according to which they are to be made, which we must assume to be the case here in view of the finding referred to, no reason is apparent why the vendee may not refuse in advance to go on with the contract, instead of waiting until plaintiff has manufactured and offered for delivery the sets still to be furnished, and then refusing to accept the same. The latter course would hardly be consonant with fair dealing where it is apparent that goods to be manufactured by the vendor at great expense would be unsatisfactory to an extent warranting and in fact compelling their rejection when offered."

For as has been stated (38 L. R. A. (N. S.) 544):

> "Acceptance of one or more installments of goods or articles purchased under a contract, to be delivered in instalments, is not acceptance of the whole, and hence the fact that the purchaser under such a contract accepts one or more instalments of goods or articles which are defective in quality does not in general impose on him the duty of accepting future instalments if they are likewise defective, and in this respect not in accordance with the requirements of the contract.
>
> And acceptance of one instalment not according to the contract of sale is not a waiver of the right by the purchaser thereafter to insist that other instalments shall meet the requirements of the contract."

Under no interpretation of the contract can it be said that the appellee performed its agreement nor can any rule of law be adduced to show a waiver of the appellant's right to terminate the contract for breach of warranty and sue for the damages sustained by it by virtue of the appellant's failure to perform.

IV.

In the Light of the Authorities Cited Supra and Portions of the Record Set Out Above, the Appellant Was Clearly Justified in Declaring the Contract Canceled on April 23, 1923, and Was Entitled to Recover on Its Counterclaim.

At the trial of this action the appellee argued the point that the express warranty contained in paragraph (4) of the contract excluded all implied warranties and that said warranty was conditional in that it was not to be effective unless the locks were returned to plaintiff's main office.

In other words, the plaintiff overlooks and disregards the first sentence of the warranty, "The company guarantees its locks as to material and workmanship," and goes on to assume and argue that all paragraph (4) amounts to is a guarantee to repair or replace defective locks if returned to the main office of the plaintiff.

The absurdity of this contention is demonstrated as follows, read as the appellee would have it the guarantee would read: "The company guarantees its locks as to material and workmanship, provided the locks are returned to its main office."

Paragraph (4) really contains two guarantees—one for material and workmanship and one a covenant to repair or replace defective locks.

Unless the locks were good under the first guarantee of material and workmanship the latter repair warranty is surplusage. The appellant contracted for workable locks, not free repair service, for it could get no profit out of locks being constantly repaired at the main office. As shown by the evidenuce the locks supplied by appellee would have been constantly in transit, if this was the extent of appellant's obligation.

One of the main reasons why the appellant terminated the contract was because the appellee failed to send it locks as needed. The testimony of Mr. Miller was to the effect that they did not receive hardly any locks in 1922 and that the locks received were unworkable.

It would be an empty sort of warranty which would require the few locks received to be returned, especially when the returning only resulted in replacements which were just as bad as the locks returned.

As stated above, paragraph (4) of the contract contains two covenants: (1) A covenant to repair if the locks were returned to the home office, and (2) a warranty of material and workmanship.

The warranty was breached as soon as a defective lock was shipped by the plaintiff.

As demonstrated in the forepart of this brief the law on this subject is well settled. Where there is a breach of warranty as to quality and workmanship on a machine, retention and use of the appliance by the vendee does not waive the warranty, and furthermore the vendee can recover for the money he spent in trying to make the article conform to the warranty.

The appellee at the trial also attempted to advance the proposition that, having used and retained the locks, the defects were waived. But even under this theory the appellee fails because the defects might have been waived as to locks already in use over an extended period, but all new locks would be subject to a strict construction of the warranty. In other words, if the last batch of locks received did not conform to the warranty they could be returned and the contract cancelled by the defendant.

The court, in its findings of fact, found that the appellee breached its contract from time to time as to warranty of material and workmanship, but that the appellant failed to take advantage of these situations as they arose from time to time. Under the cases cited *supra* it is apparent the court erred in its conclusion that the appellant failed to take advantage of these breaches.

The appellant was justified in the course it took in the face of the appellee's inexcusable conduct. There was no

waiver of the appellant's rights to cancel the contract for breaches on the part of the appellee and upon such cancellation appellant was entitled to recover the damages which it suffered because of appellee's wrongful act.

To properly present this branch of the case it is necessary to ask the court's indulgence if we introduce and discuss certain portions of the testimony. However, before discussing the evidence it might be well to first lay down the rules of law applicable to this portion of appellant's argument.

In Fox v. Harvester Co., 83 Cal. 333, it was held that:

> "For breach of warranty of a machine sold by the manufacturer, and returned after trial as being unfit for use, the measure of damages is the price paid by the purchaser, with interest, and in addition thereto, such amount of expense or loss as he has actually sustained in *bona fide* attempts to make the machine do the work for which it was constructed, including compensation for the loss of time, horse-hire, use of animals, and wages and board of hired men."

In accordance with the fundamental rule that, where goods sold with warranty and fail to conform to the same, the buyer is entitled to recover as direct damages expenses incidental to the use of the merchandise, the buyer may also recover the amounts he expended to make the chattel conform to the warranty.

For instance, in the case of Silberhorn Co. v. Wheaton *et al.*, 5 Cal. Unrep. 886, the buyer was held to be entitled to recover the cost of curing hams which had been insufficiently treated.

And in McLennan v. Ohmen, 75 Cal. 558, it was held that where an engine was sold under a warranty and failed to conform to the same the buyer could recover the cost of installation, the difference between the actual value and the value, if it had conformed to the warranty, plus the loss incurred by an effort in good faith to use it for such purpose. This item included the extra coal which he had to use.

Erie City Iron Works v. Tatiem, 1 Cal. App. 286, was a case where the defendant had the exclusive agency on the coast for the sale of the plaintiff's steam engines. Plaintiff sold the engines to the defendant on a warranty of its fitness for use in running machinery.

In 1888 defendant received an engine and resold it with the same warranty. In 1888 the engine was installed and used by the subvendee. In December, 1889, the engine deevloped defects and the plaintiff supplied a new governor for the motor. This did not remedy the defects and the subvendee spent $219 trying to make the machine function. In 1891 the defendant sued the subvendee for the purchase price, which was three years after the subvendee had received and used the engine.

The suit was compromised and settled by the defendant allowing the subvendee the $219 on the purchase price. Shortly after this compromise the defendant sent the plaintiff a bill for $319, being the $219 paid out for remedying the defects and $100 attorney's fees in the suit between the defendant and subvendee.

The court held that (syllabus):

> "Where an engine was sold upon warranty of its fitness for use in running machinery, the measure of

damages for a breach thereof is the excess of value which it would have had at the time to which the warranty referred, if it had been complied with, over its actual value at that time, together with a fair compensation for the loss incurred by an effort in good faith to use it.

Defects in the engine which constituted the breach of warranty were not waived by retention of the engine. The purchasers had the option either to return the engine and rescind the contract, or retain it and sue for damages for the breach or may counterclaim the damages in an action for the purchase money.

A credit given for repairs by inserting a new governor in the engine, which it was supposed would remedy the defects, but which failed to do so, does not constitute a waiver of future damages, or of expense incurred in the continued use of the engine, for which the original vendor is liable. Such credit was in effect a payment which the vendor was bound to make.

The delay in presenting the claim for damages for breach of warranty, in addition to the credit for repairs, cannot constitute an estoppel to claim further damages for breach in view of the relations of the parties and that the purchasers had the exclusive right to handle on this coast articles manufactured by the vendor, and were charged with the duty to advance its sales and trade on this coast."

It will be noted that in this case the engine was retained and used for over three years before any claim was made for damages resulting from the breach. We also wish to call the court's attention to the rule stated that:

"The delay in presenting the claim for damages for breach of warranty, in addition to the credit for re-

pairs, cannot constitute an estoppel to claim further damages for breach in view of the relations of the parties and that the purchasers had the exclusive right to handle on this coast articles manufactured by the vendor, and were charged with the duty to advance its sales and trade on this coast."

To the same effect is

Western Steel etc. Co. v. Feykert, 69 Cal. App. 763, and

Cohn v. Bessemer G. E. Co., 44 Cal. App. 85.

Applying these principles to the case at bar clearly demonstrates that the appellant had a right to recover for all of the loss incurred in attempting to make the locks conform to the warranty and for all of the expenses to which it was put to keep the same in operation. The appellee was in the business of manufacturing coin locks and Mr. Van Cleave was supposed to be a coin lock expert. As such he must have known that if he sent the defendant locks which were rough cast, not machined, poorly constructed, and made of improper materials, that the appellant would have to do a great deal of work on them to make them operate. The very fact that the samples sent the defendant were made of hard metal, well machined, polished and made of proper materials shows that he knew what the lock ought to be if properly constructed of proper materials.

Mr. Van Cleave not only should have known, but he actually knew what troubles the appellant was having in using the locks and all of the defects were called to his attention, but to no avail. The appellant sent in an order for locks in January, 1923, which was unanswered and

unfilled until after April 23, 1923, when the appellant finally terminated the contract because of the appellee's failure to perform it.

The record shows that it was necessary to work over every lock before it could be installed and that a corps of mechanics and trouble-shooters were necessary to keep the locks in operation after installation.

Testimony of Clinton E. Miller [Tr. p. 332]:

> "It was very necessary for us to have a man whose principal duty was to look over the locks, work over the lock, and put it in proper working order, before we attempted to put it on a location. We had to have an extra man in Los Angeles on full time. We had to have a man at each of the beaches who would have to be there on trouble calls, because people would get locked in with the locks, and the doors would sometimes be broken open and broken down; and we had to employ a matron at our comfort station in Venice, to be there in constant attendance in order to report the calls to our men that we employed at Venice, to come and repair the locks and fix it, so it would work properly. We had the same situation in San Francisco and Seattle, that required us to employ one man and sometimes two men in each of those places in order to take care of the locks, due principally to the poor material and workmanship of the locks."

Mr. Miller testified that he had one of the locks installed as they came from the appellee without any working over. The result was that the lock was out of order the same day it was installed. [Tr. p. 453]:

> "A. I think Mr. Van Cleave called my attention to it, and I told the men, hereafter I want them installed exactly as they sent them, because he said all

our trouble out here was that we were trying to fix these locks and making them worse instead of better. And I called all the men in and demanded that they put them on exactly as they sent them. They all said I was wrong, and it was proved I was wrong.

(Witness continuing): I wrote Mr. Van Cleave we were going to do that. I wrote him that I had been trusting to others to look after the mechanical end of the business. I said, 'And your letter convinces me it hasn't been done as it should be.' I meant that at the time—in 1922.

Q. And you told him you were greatly surprised to learn they were using those keepers, didn't you? A. Yes, and I made them install them exactly as they came then, and they were all out of order and in trouble the next day."

The record also shows that if the locks had been as warranted they would have given a minimum of trouble and would have permitted of collection by the various sublessees without the necessity of the appellant sending men to Texas, Seattle and San Francisco to trouble-shoot and collect.

Testimony of Clinton E. Miller [Tr. p. 342]:

"I wired the General Service Company at Baltimore, whose lock I considered to be one of the best in the United States, and offered to pay Mr. Hervey's expenses, who was president and controlling owner of the company—offered to pay his expenses if he would come to Los Angeles and discuss the matter of obtaining locks for our locations. Before that time, Mr. Garrison and I had decided that the lock situation had arrived where there was not enough for both of us to give so much time to it; and I made a give and take

proposition and Mr. Garrison decided to sell his interest to me, which I purchased. And upon Mr. Hervey's arrival here, we negotiated, and I made an arrangement with him to supply us with locks—made a tentative contract with him to supply us with properly working locks. I thereupon sent a telegram. I had received a few sample locks, about the 25th sample I had received.

Q. That is from the plaintiff? A. Yes, and upon receipt of that notice that they were going to send us some locks, I wired them not to send locks, that I had made arrangements for other locks and sold a one-third interest to Mr. Hervey.

(Witness continuing): Since the date of that telegram we haven't ordered any locks from the plaintiff. We received the first locks from the General Service Company, Mr. Hervey's company, in April, 1923, about the time we broke off from the Coin Controlling Lock Company. They were installed very promptly.

Q. By Mr. Newby: Now, if you will, tell us what experience you had with these locks that were immediately installed that you got from the new company? A. Well, the locks were in the first place refined and polished and worked perfectly. As to material and workmanship, there was no criticism. We have never had an order into the factory that has not been filled within two weeks after we ordered it.

Q. By Mr. Newby: At that time did you have difficulty with the lock? How did your experience compare as to its working or jamming or failing to work, with the locks of the plaintiff? A. So far as I have been able to observe, from the moment we put on the new locks there has never been a lock jammed, never been a person locked in and never been a miss in the operation of the locks. We can let the locks go

for months without anybody looking at them, and it works perfectly—the new lock.

(Witness continuing): And did then. The operation of this new lock from the Hervey company at that time, in 1923, was perfectly satisfactory to the defendant. We now have the same locks at the same locations. There has been no change made. They are still operating satisfactorily."

The record also shows the amount of damages sustained by the appellant because of the defects in the appellee's locks.

Mr. Crews testified that he was an accountant and worked for the appellant from April 1, 1922, until September 1, 1924; that Exhibits A-11 and A-12 [Tr. pp. 498 and 501] were prepared by him and show the amount of money taken in by certain locations together with the amounts spent by the appellant to keep them in operation.

The exhibits are here referred to with the testimony explaining the same:

"Q. By Mr. Newby: Now, will you explain, Mr. Crews, just what these sheets do show, so that the court may see how you made them out and what items were included? A. Included in this statement are items of men in outside territory. At Houston, Texas, for instance, that was a town of a considerable amount of business, we were compelled to keep a man there just for the purpose of trouble shooting and also to work over the locks that were installed on the doors. I have put down the monthly payment to that particular man each month in that period. We had locks also in Dallas and other similar places—

Q. Without going through all of them, in other territories, you did the same? A. Did the same.

(Witness continuing): I have not included in that the general overhead and managerial expense nor the ordinary expense for collecting. I put into those accounts solely the amount that we had to pay for this trouble shooting and working over these locks outside of Los Angeles. I have not included any of the expenses in the city of Los Angeles.

Q. Why did you leave that out? A. That might be considered, probably correctly, that it would be a nominal expense of the lock company.

Q. In other words, in Los Angeles, they would have to have an office anyhow where they have the general management of the whole business? A. The men in Los Angeles did a great deal of that; they would not send locks to locations until we thought they would fit when placed against the door. We always found there was some additional work to be done. Most of the lock companies,—well the only one I have any knowledge of is the General Service, they will give locks to a hotel at a distant location and leave it to the hotel to apply. We have to keep men to do that installing and also attend to trouble afterwards, and those men are expensive. Salaries is the only thing included in this statement.

Q. What does that aggregate show? A. $11,-027.50."

Testimony of J. H. Crews [Tr. p. 516]:

"Q. By Mr. Jones: Now, this exhibit here with respect to these earnings you just estimated that? A. No. sir.

Q. Did you figure out how much was expended? A. I took the actual book's figures and averaged them for the twelve months.

Q. And you charged for trouble and repairs all of the salary of those men at Dallas and Houston, and these other men there, did you? A. I was referring to the first statement, that was averaged. The second statement is taken from the books themselves.

Q. And that was charged, all the salaries, to repairs and trouble shooting? A. They were all not charged to that, no.

Q. How much of it? A. On that statement is, those particular men, all the money paid to them, including their expenses and remuneration, was charged to this item.

(Witness continuing): It is not customary for these companies to keep a representative in each locality for the purpose of representing the company there and to see that these locks are in repair. The expense I have had with the companies has been the opposite. They don't all send men to install the locks. There are locks in three locations that I have seen on the Pacific Coast from lock companies in Indianapolis, and the locks were sent to the hotel and they did the installation and collection and repairing and sent back the lock companies' proportion to them, without anyone ever visiting the hotel."

Mr. Crews in explaining the items in Exhibit A-11 testified as follows:

"Q. By Mr. Newby: Mr. Crews, with reference to the Hayward Hotel, you state here that the yearly receipts were $411.50, and the Alexandria Hotel $1,-208.12, they were the actual receipts for the year pre-

ceding the removal? A. That was the average yearly production for the time they were installed.

(Witness continuing): The same is true of the others. That is the portion the Pacific Coin Lock Company received. The percentage that went to the location is not included."

The sum of $23,875.45 appearing at the foot of the exhibit represents the profits which the defendant would have made if the locks had conformed to the plaintiff's warranties of workmanship and material.

The general rule of contracts is that there must be full performance on the part of the plaintiff before he can demand the sums due under the contract unless the defendant has prevented performance or wrongfully repudiated or terminated the contract.

The question of whether or not the appellant waived strict performance and the warranty has already been discussed *supra* and will not be discussed in this branch of the case. We assume that we have clearly demonstrated that there was no waiver of the warranties as to material and workmanship nor of the appellee's obligation to deliver locks when needed, and that the court erred in finding that the appellant waived the breaches.

With this in mind we call the court's attention to the following statement of the rules of law governing performance generally [6 R. C. L., p. 966, Sec. 342]:

"By the common law, a party to a contract was compelled to show a literal performance of the stipulations of it before he could claim damages for a non-performance against the other. Expressions in some of the more recent cases seem to indicate a

tendency to relax the rigor of this rule. Thus, it is said that the law looks to the spirit of a contract and not the letter of it, and that the question therefore is not whether a party has literally complied with it, but whether he has substantially done so. Other courts have said that substantial, and not exact performance, accompanied by good faith, is all that law requires in the case of any contract to entitle a party to recover on it. Although a plaintiff is not absolutely free from fault or omission in every particular, the court will not turn him away if he has in good faith made substantial performance, but will enforce his rights on the one hand, and preserve the rights of the defendant on the other, by permitting a recoupment. Such statements would appear to be especially applicable to cases in which, in view of the nature of the contract, a substantial compliance must have been contemplated by the parties. For instance, under a contract to build a carriage just like a model, the plaintiff is doubtless bound to show that the carriage tendered is as good in every respect as the model; that in style, size, general appearance, etc., it is like it. Or to state the proposition in the usual form, the plaintiff cannot recover unless he shows a full and substantial compliance with the contract on his part. But to say that the parties intended that the two carriages should be precisely alike in every unimportant particular, that there should not be the least difference between them in any part, however slight, would be placing upon the language used a forced and unreasonable construction. It is impossible for any mechanic to make, even two spokes precisely alike, so that a glass, or possibly the naked eye, cannot detect some slight difference between them. In some cases the rule has been laid down that where a thing is so far perfected as to answer the intended

purpose, and it is taken possession of and turned to that purpose by the party for whom it was constructed, no mere imperfection or omission which does not virtually affect its usefulness can be interposed to prevent a recovery, subject to a deduction for damages consequent upon the imperfection complained of, but that the indulgence is not to be so relaxed as to cover fraud, gross negligence, or obstinate and willful refusal to fulfill the whole engagement, or even a voluntary and causeless abandonment of it. Again, as the ordinary common law rule was in many instances found to operate harshly, equity courts have not always adhered to it. A punctilious performance of the *minutiae* of a contract is not always required in equity, though the want of it may present a difficulty in a court of law. If the conditions have been substantially performed, and the benefit of the contract fully secured to the opposite party, equity has considered it sufficient."

Whether or not there has been a substantial performance of an agreement depends upon the peculiar circumstances surroundings each particular case, subject, however, to the broad general principles outlined above.

For instance it has been held that there was substantial performance where the deviation or omission were so slight that they might have been made by one honestly endeavoring to comply with his contract. Perry v. Quachenbush, 105 Cal. 299.

In the case at bar the appellee furnished excellent sample model locks, but impossible locks for general use. This demonstrates that it could have furnished good locks if it had so desired. Was this evidence of good faith or an honest endeavor to comply with the contract?

Such a conclusion manifestly cannot be reached when inferior or defective material was used throughout the locks.

There must be no wilful or intentional departure and the defects must not prevent the whole or be so material that the object which the parties intended to accomplish is defeated; that is to have locks requiring a minimum of attention at the time needed and when ordered.

The rule is well stated as follows in Foeller v. Heintz, 24 L. R. A. (N. S.) 327, 137 Wis. 169, 118 N. W. 543, that:

> "To constitute substantial execution of a building contract, or one to supervise and direct the construction of a building according to specific plans and with the usual architect's duty in such cases, the structure as completed must be the result of good faith efforts to perform strictly, and must satisfy with exactness all essentials to the accomplishment of the proprietor's purpose."

It was held in this case that where the defects were of such a character as to compel a partial reconstruction of the building that that was not a substantial performance.

Also, see:

> Bush v. Jones, 144 Fed. 942, 6 L. R. A. (N. S.) 744.

Besides failing to furnish proper locks the appellee also failed to provide locks as needed.

The record shows that the appellant was never able to get shipments on time and that as a result of the delays in shipping, lost a great many locations.

The cash value of the locations so lost was of course too speculative to recover as damages, but this fact did not excuse the failure of the appellee to furnish the locks when ordered for these locations.

The conduct of the appellee is still more reprehensible when the fact is taken into consideration that the appellee knew that the appellant was losing locations because of its procrastinating policy in delaying shipments. [Tr. p. 230]:

> "We have lost three splendid locations in the city of Los Angeles because we did not have locks to equip toilets with. Your inability to supply us with locks will cut into our income.
>
> The locations lost are excellent locations—as good as any we have, outside of possibly the Pacific Electric. You will have to arrange some way to take care of these orders we send you, if you expect us to compete. It is disheartening to go out and convince a man that our proposition is the best offered, promise to put locks on within a certain time which he demands and then have you wire us and tell us you can't furnish us with the locks."

[Tr. p. 337]:

> "Q. By Mr. Newby: Now, Mr. Miller, you stated that certain locations were secured in the city of Seattle. Were there any locations secured from the city? You mentioned an ordinance was passed. A. I recall that very well, because I secured that myself. The contract with the city of Seattle was an ordinance passed by the City Council and signed on the 14th day of July, 1920. We were unable to secure locks, although we made repeated requests by wires and letters, and every week or two for a

year, and were finally advised by our attorneys in Seattle that the city had put on some locks that they had secured elsewhere. But we again, through our attorneys in Seattle, were enabled to get the contract renewed, and finally we got the locks and put them on the 7th day of July, 1921, more than a year after we had requested them.

Q. I will ask you to state to the court whether or not in your opinion you could have secured additional locations prior to the termination of this contract if you could have secured locks to put on the locations? A. Yes, indeed; there were several very attractive avenues for new business which I purposely refrained from trying to get, because we had neither a supply of locks nor locks that would work.

Q. Can you tell the court any particular locations or case that came in that category you have just mentioned, that you had it arranged, but could not get locks of the kind or quality desired? A. Southern Pacific Railroad."

The appellee offers no excuse for this delay except that in 1922 it was going into a merger and couldn't manufacture the locks during that time.

With such a situation it would have been folly for the defendant to remain tied to the plaintiff any longer jeopardizing its present business and rendering impossible any future expansion.

In the cases of Pacific Sheet Metal Works v. California Canneries Co., 164 Fed. 980, and California Canneries Co. v. Pacific Sheet Metal Works, 144 Fed. 886, it was held that under a contract which required defendant to furnish plaintiffs with all the tin cans required in its cannery during a season, not exceeding a stated

number in any one day, with a proviso that it should be released from any obligation if it should be unable to perform by reason, *inter alia*, "of damage by the elements or of any unavoidable casualty," it was no defense to an action for breach of the contract for failure to furnish the number of cans required that defendant contemplated the use of a cargo of tin which at the time the contract was made had been shipped from Liverpool for San Francisco by way of Cape Horn, and that by reason of adverse weather the vessel was longer than usual in making the voyage, there being no provision in the contract with respect to such shipment.

This case is almost on all fours with the case at bar. The Sheet Metal Co. failed to deliver the cans regularly or in the required amount, causing the defendant extra work, expense, lay-offs and the loss of fruit. The Canning Company was constantly complaining and demanding cans, but Metal Works Company failed to supply on time.

The Sheet Metal Works Company put up the same line of excuses as the appellee in this case, namely, that there were strikes and shortage of materials, etc., but the court held that the Company had failed to substantially perform.

Enough has been said on this subject of substantial performance as the court is familiar with these fundamental rules governing the performance of contracts.

However granting for the sake of argument that the appellee did substantially perform still the appellant may recoup in damages the losses sustained by virtue of the failure of the appellee to completely perform

Canifornia Canneries Company v. Pacific Sheet Metal Works and Pacific Sheet Metal Works v. California Canneries cited *supra.*

In the instant case the proven damages suffered by the appellant by virtue of the appellee's failure to perform was $11,027.50, representing the actual cost of making the locks work and conform somewhat to the warranty, and $23,875.45, the loss of profits due to defective locks being removed from locations by sub-lessees, a total loss of $34,902.95.

The great loss of business due to the failure to get proper locks on time being too speculative cannot be recovered, but this fact does not excuse the appellee nor prevent the appellant from terminating the contract on April 23, 1923.

V.

Defects in Findings.

Although findings of fact are so labeled, it does not always follow that they are true findings of fact. In the instant case the alleged Findings of Fact Nos. VI and X are conclusions of law, and it is upon these conclusions of law that the court based its judgment.

These findings are as follows:

"V.

> "That at various and sundry times from and after the said February 23, 1915, plaintiff delivered to the defendant, Pacific Coin Lock Company, large numbers of coin controlled locks covered by the said letters patent belonging to plaintiff, to be used by the said defendant, Pacific Coin Lock Company, in accordance with the terms and conditions of the aforesaid contract.

X.

"That plaintiff acted promptly and immediately brought suit against defendant for damages for breach of contract."

The recitation in Finding No. VI that the "plaintiff failed from time to time in living up to its agreement." The defendant, however, did not take advantage of these situations as they arose from time to time is a statement of a conclusion of law and not a finding of fact. The ultimate facts upon which this conclusion is based are not found. Standing as it does it means nothing.

Finding No. X must fall for the same reason. This finding states that the "Plaintiff acted promptly and immediately brought suit against defendant for damages."

Bearing in mind that the rules of law applicable to pleadings are governed by California law, in the instant case, an examination of the authorities definitely establish the following propositions:

1. Unless waived written findings of fact are necessary.

C. C. P. 632, 633; 24 Cal. Juris. 931.

2. Must find on all material issues raised by pleadings.

24 Cal. Juris. 935; 940 C. C. P. 632, 633;
2 Cal. Juris. 1032.

3. Court cannot make findings on issues not raised by the pleadings and must conform to the same.

24 Cal. Juris. 977, 983.

4. Findings must be findings of ultimate facts and not conclusions.

24 Cal. Juris. 968.

5. Must not be inconsistent and contradictory.
   24 Cal. Juris. 965.

6. Must conform to and be supported by the evidence.
   24 Cal. Juris. 990.

7. Must support judgment.
   24 Cal. Juris. 996.

Proposition No. 1 is so elementary as to not need discussion save to refer to the code section. We discuss the remaining propositions by number.

2. Finding on Material Issues.—The rule is well stated in 24 Cal. Juris. 940:

> "It has been repeatedly affirmed that where a court renders a judgment without making findings upon all material issues of fact, the decision is against law, and constitutes ground for granting a new trial in order that the issues of fact may be determined, or for reversal upon appeal, * * *"

In the case at bar the court failed to find on the question of the plaintiff's failure to perform its covenants and the defendant's counterclaim, though it attempted to do so in Finding No. VI. As will be discussed later, this finding is nothing more than a conclusion of law. There is nothing in the findings concerning the defendant's right to counterclaim, all of which must be covered by the findings or there is a failure to find on all the issues.

3. Court cannot make findings on issues not raised by pleadings.

In 24 Cal. Juris. 983, the rule is stated as follows:

> "Findings outside the issues are not conclusive upon the parties in a subsequent action, and may

> not, for the purpose of determining whether the findings support the judgment, be considered in the action in which made, for a party must recover, if at all, upon the case made by the pleadings and evidence, and not upon another case which might have been made. If, without such findings, the judgment is insufficiently supported, it may be reversed, * * *"

In the instant case the plaintiff failed to plead damages for loss of rentals on locks and wrongfully introduced evidence over the objections of defendant concerning the number of locks in defendant's possession on April 23, 1923. All of this has been discussed in the forepart of the brief and will not be repeated here. There was no issue raised either by the pleadings nor the evidence as the case was not tried on the theory of an action for recovery of rentals due on the locks or the rental value of the locks. This being the case, the court erred in making amended finding No. IX and then basing conclusions of law upon the same.

Finding No. IX having been erroneously made, the conclusions of law and judgment based thereon must also fail.

4. Findings must be ultimate facts and not mere conclusions.

> "Findings of fact and conclusions of law, when filed, constitute the decision of the court upon a cause submitted for its determination. It is the purpose of findings to dispose of the issues of fact and to exhibit the grounds upon which the judgment rests * * *."
>
> 24 Cal. Juris. 927.

"The findings of fact should be definite and certain. They should be so framed that the defeated party can specify intelligibly the particulars in which they are not supported by the evidence, where such point is made, and that an investigation is not required upon review to determine what issues have been decided. While extreme accuracy of statement and minuteness of detail are not required, findings are insufficient if they merely tend to establish the fact in issue, or state only general conclusions leaving in doubt what particulars are established."

24 Cal. Juris 963.

The rule is well stated in 24 Cal. Juris. 968:

"It has been frequently observed that findings should be of ultimate facts, and that it is unnecessary to state the probative or evidentiary facts, for a finding of ultimate facts includes a finding of all of the probative facts necessary to sustain it. Since ultimate facts are required to be pleaded, it is only necessary, in order to determine the sufficiency of a finding of fact, to ascertain what statement of that fact is required in a pleading. It follows that statements of conclusions of law or of the reasons of a judge for his decision are insufficient as findings. And a statement of mere matters of evidence is insufficient unless the ultimate fact necessarily results therefrom."

In the instant case there is no finding of ultimate facts but merely conclusions of law.

The basis of distinction between findings of fact and conclusions of law is discussed in 24 Cal. Juris. 927-931, Sec. 177, 178:

"It is in many cases difficult to distinguish between findings of fact and conclusions of law; the ultimate facts are not in all cases found only from direct evidence, but are to a great extent presumed from the existence of other facts, or arrived at by an inferential process, in which the evidentiary facts become the premises and the ultimate fact the conclusion. In most cases the question is determined by a consideration of the means by which the result is obtained. If, it is said, from the evidence, the result can be reached by that process of reasoning adopted in the investigation of truth, it becomes an ultimate fact, to be found as such. If, on the other hand, resort must be had to the artificial processes of the law in order to reach a final determination, the result is a conclusion of law. Any doubt as to the category in which the result reached by the court belongs is to be resolved in favor of the judgment.

"Illustrations.—As illustrating the distinction between findings of fact and conclusions of law, it may be stated that the following have been held to be findings of fact: that a party did not rescind a sale, that he was not compelled to pay certain moneys for which reimbursement was sought, that he had no prescriptive right, or that he kept blasting powder, or had been greatly damaged, that a street was a public highway, that a testator was of unsound mind, that a cause of action was barred by the statute of limitations, that an agreement was cancelled by consent, that an article was made and delivered according to contract, that a judgment was not lien upon premises, that an action had been abandoned, and that there was or was not another action pending.

"On the other hand, the following have been held to be conclusions of law: that plaintiff has been guilty of laches, that a lien was not filed within the

time required by law, that an assessment was valid, that a party was or was not guilty of willful desertion or extreme cruelty, that the consideration for a contract failed, that a sum of money was or was not owing from one of the parties, that a party was or was not entitled to recover judgment, that a judgment was final, that one did not convert property, that a building was a nuisance, and that a transaction was a mortgage and not a pledge. It is firmly established that ownership may be pleaded and found as an ultimate fact; but it is equally true such averment may be a conclusion of law, and may be determined by the court as such a conclusion. The preliminary recital relative to appearances or defaults of parties which is usually inserted in findings is not in reality a finding of fact, and a statement by a judge of his reasons for a decision is neither a finding of fact nor a conclusion of law."

When tested by the rule above stated it would seem that the only finding of fact bearing on the judgment, which is a true finding, is "that on said April 23, 1923, the defendant had in its possession six hundred and four (604) locks."

It is upon this finding that the judgment must rest. All other portions of the findings of fact are conclusions of law.

As has been pointed out *supra* this finding was not within any of the issues raised by the pleadings.

5. Findings must not be contradictory and inconsistent.

As stated in 24 Cal. Juris. 965:

"Findings should be consistent. Where there are contradictory findings about matters material to the

> merits of a case, and the determination of them, one way or the other, is essential to the correctness of the judgment, the judgment cannot stand."

In the case at bar findings No. V and No. VI are contradictory. In No. V the court finds that the plaintiff delivered locks in accordance with the terms and conditions of the contract and in finding No. VI finds that the plaintiff failed from time to time to live up to its agreement. What could be more contradictory? Being contradictory and inconsistent they fail to support the judgment and constitute ground for reversal.

24 Cal. Juris. 965.

6. Findings must conform to and be supported by the evidence.

This of course is elementary but we cite 24 Cal. Juris. 990 as stating the rule clearly and succinctly as follows:

> "It has been repeatedly held findings of fact must conform to and be supported by the evidence. A judgment which rests for its validity and support upon a finding which is contrary to the evidence cannot be sustained, but may be set aside upon appeal, or motion for new trial."

In the case at bar the court permitted evidence to be introduced, over defendant's objection, upon questions not within the issues and proceeded to make findings on the basis of the erroneously admitted evidence. We refer to the introduction of Exhibit 21 showing the number of locks in defendant's possession on April 23, 1923. If there had been other evidence properly introduced and the facts had been within the issues the finding would

have been immaterial, but here the whole judgment is one for rents based on this Exhibit 21, upon an issue neither pleaded nor proven.

7. The findings must support the judgment.

24 Cal. Juris 996 states the rule in the following language:

> "In view of the fact that judgment must be entered upon the decision of the court—that is, the findings of fact and conclusions of law—it is obvious that the judgment as entered must be supported by and conform to the findings. This must affirmatively appear from the findings * * *."

It will be seen from the above statement that when the judgment is based on findings which are inconsistent and contradictory, or when based upon findings outside of the issues it is not supported by the findings.

To the same effect is:

Gamache v. South School Dist., 133 Cal. 145.

In conjunction with this discussion of defects in the findings it might be well to pause for a moment to also call to the court's attention that the conclusions of law should be drawn from findings and not from other conclusions of law.

24 Cal. Juris. 1002.

It is also true that judgments based upon conclusions of law which themselves are not supported by findings must fall.

CONCLUSION

In conclusion we wish to call the court's attention to the fact that the appellee has failed to either properly allege or prove any facts upon which the District Court could have given a judgment for the rental value of the locks. That the District Court has also failed to make any findings of fact or conclusions of law which would justify or support the judgment rendered.

We wish to further point out, however, that the appellant has properly pleaded and proven its items of damages on its counterclaim, and due to the failure of the lower court to make any proper findings upon the question of the appellant's counterclaim, the Appellate Court is without proper findings upon which it can base a judgment in favor of the appellant for recovery on its counterclaim.

For these reasons we request that this court reverse the judgment insofar as it gives damages to the appellee for the rental value of the locks and to remand the case to the lower court for a new trial on the question of the appellant's right to recover on its counterclaim. That this form of procedure is in accordance with the practices of the Federal Court and the California courts is well settled in the leading case of Title Insurance and Trust Company v. Ingersoll. 158 Cal. 474, 493, and the authorities cited therein.

In making this request the appellant does not wish to lead this court to believe appellant waives any rights which it may have against the appellee for its failure to perform its covenants and for the damages which appellant suffered by virtue of the wrongful acts of the appellee as shown by the record.

Respectfuly submitted,

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